March 5 1872
Pltf submits —
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~324.~~ 125.

GEORGE W. DENT, PLAINTIFF IN ERROR,

vs.

FRANZ EMMEGER AND CATHERINE GRAHAM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

FILED DECEMBER 5, 1870.

4 July 1836 Instrument —
March 9 1872 —
Affirmed
Jas Grayson —

SUPREME COURT OF THE UNITED STATES.

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1 MISSOURI DISTRICTS, *sct:*

Pleas before the honorable circuit court of the United States for the districts of Missouri, at the October term thereof, A. D. 1870.

GEORGE W. DENT, PLAINTIFF,
ag'st
FRANZ EMMEGER AND CATHERINE GRAHAM, defendants. } Ejectment.

Be it remembered that heretofore, to wit, on the twenty-fourth day of December, A. D. 1869, there was filed in the clerk's office of the circuit court of the United States for the districts of Missouri, the following declaration in the above-entitled case, to wit:

Declaration.

UNITED STATES OF AMERICA,
State of Missouri, ss:

In the United States circuit court for the districts of Missouri, April term, 1870.

George W. Dent, a citizen of the State of California, by his attorney, complains of Franz Emmegger & Catherine Graham, citizens of the State of Missouri, of a plea of trespass and ejectment. For that whereas, the said plaintiff was, on the first day of November, in the year of our Lord eighteen hundred and sixty-nine, legally entitled to the possession of a certain tract, piece, or parcel of land, situate, lying, and being in the county of St. Louis and State of Missouri, containing thirty
2 acres of land, and described as follows, to wit: Being part of United States survey No. 3067, of a tract of land confirmed to Gabriel Cerre, or his legal representatives, and is bounded north by the road separating it from what is known as "New Luxemburg;" east by property now in the possession of Patrick Murphy, a tenant of Catherine J. Cotes; south by the south line of said United States survey No. 3067; and west by the Lemay Rock road, as extended, or Grand avenue. And that the said plaintiff, being so entitled to the possession thereof, the said defendants entered into and upon said land and premises, afterwards on the day and year aforesaid, and unlawfully withhold from the plaintiff the possession thereof, to the damage of the said plaintiff of one thousand dollars, and therefore he brings his suit.

GLOVER & SHEPLEY.
Attorneys for Plaintiff.

And on the twenty-seventh day of December, A. D. eighteen hundred and sixty-nine, there was issued out of the clerk's office of the circuit court of the United States, for the districts of Missouri, the following summons, to wit:

Summons.

MISSOURI DISTRICTS, *sct:*

The President of the United States of America, to the marshal of the eastern district of Missouri, greeting:

You are hereby commanded to summon Franz Emmeger and Cath-

erine Graham, citizens of the State of Missouri, that they be and appear before the honorable circuit court of the United States for the districts of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said districts, on the first Mon-
3 day of April next, then and there to answer unto George W. Dent, a citizen of the State of California, in a plea of trespass and ejectment to the damage of said plaintiff one thousand dollars. Hereof fail not, and have you then and there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the 27th day of December, A. D. eighteen hundred and sixty-nine.

Issued at office in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] BEN. F. HICKMAN, *Clerk.*

On which summons issued as aforesaid, the marshal of the United States for the eastern district of Missouri, made the following return, to wit:

Marshal's return on summons.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Executed this writ by reading the same and a copy of the declaration to the within named Franz Emmeger, at Carondelet, in said dis't, Feb. 14th, 1870; the within-named Catharine Graham not found in said district.

C. A. NEWCOMB,
U. S. Marshal, E. D. Mo.,
By J. W. MORGAN,
Dep'ty.

And afterwards, at a regular stated term of the circuit court of the United States for the districts of Missouri, begun and held at the city of Saint Louis, in said district, on the first Monday of April, A. D. 1870, the following proceedings were had in said case on Monday, the 4th day of April, in said last-mentioned year, to wit:

Plea filed.

GEORGE W. DENT, PLAINTIFF,
ag'st
FRANZ EMMEGER ET AL. DEFENDANTS. } Ejectment.

This day come the defendants, by attorney, and files their plea of not guilty to the action brought by the plaintiff herein against them.
4 Which plea filed on said 4th day of April, A. D. 1870, is as follows, to wit:

Plea.

United States circuit court, April term, 1870.

GEO. W. DENT
vs.
FRANZ EMMEGER AND CATHERINE GRAHAM.

Now come the said defendants, by their attorneys, and defend, &c.,

and say that they are not guilty of the trespass and ejectment in manner and form as the plaintiff hath thereof complained against him, and of this he puts himself upon the country, &c.

WHITTELSEY WITH GANTT.
B. A. HILL, *Atty's P. D.*

And afterwards, at a regular stated term of the circuit court of the United States for the districts of Missouri, begun and held at the city of St. Louis, in said districts, on the first Monday, the 3rd day of October, A. D. 1870, the following proceedings were had in said case on Wednesday, the 2nd day of November, A. D. 1870, to wit:

GEORGE W. DENT, PLAINTIFF,
ag'st
FRANZ EMMEGER ET AL. DEFENDANTS. } Ejectment.

Agreement filed waiving jury.

This day come the parties by their respective attorneys, and file an agreement in writing, waiving a jury in this case, and consenting and agreeing that said case may be tried by the court without the intervention of a jury.

Case heard and submitted.

And thereupon this case being regularly called for trial, and both parties being ready, said case was heard by the court without the intervention of a jury, and was submitted.

Court finds for defendant.

And the court having examined and considered the law and the facts of the case, and being fully advised of and concerning the premises, finds for the defendants on the issues joined herein, and returns a statement of such finding, which is ordered to be filed with the papers in this case, and to be made part of the record herein.

Judgment.

And in accordance with such finding, it is now considered by the court that the plaintiff, George W. Dent, take nothing by his writ herein, and that the defendants, Franz Emmeger and Catherine Graham, go hence without day and recover against the said plaintiff the costs in this behalf expended, and that execution or a fee bill be issued therefor. Which agreement referred to in the above order is as follows, to wit:

Agreement waiving jury.

GEO. W. DENT
v.
FRANZ EMMEGER AND CATHERINE GRAHAM.

The parties agree to waive a jury in this case and to submit the same for trial by the court.

WHITTELSEY, *of counsel for def'ts.*
GLOVER & SHEPLEY, *for pl'ffs.*

And said statement of finding by the court above referred to is in the words and figures following, to wit:

Statement of finding.

GEORGE W. DENT
vs.
FRANZ EMMEGER AND CATHERINE GRAHAM.

This is an action of ejectment to recover possession of the tract of land described in the declaration, a lot of thirty acres, bounded north by road separating it from New Luxemburg; east by Murphy; south by the south line of United States survey No. 3067; and west by Lemay Rock road extended, and being also lots 90 and 91, of the Carondelet commons tract, as subdivided by the survey thereof made by Jasper Meyer in 1837–'8.

And the same having been tried by this court without the intervention of a jury, pursuant to a stipulation therefor by the attorneys of record filed in writing with the clerk of the court, the court finds specially the following to be the facts proved: The defendants were
6 in possession of the land sued for at the commencement of the suit, and the monthly value thereof is one dollar; also, that the damages would be, if plaintiff were entitled to recover, one cent, as agreed by the parties.

On the 15th March, 1789, on the petition of Gabriel Cerre, the then lieutenant governor of Upper Louisiana conceded to said Cerre a tract of land (10 by 40 arpen's) on the river Gravois which empties into the Des Peres, on the usual conditions for such concessions.

Said Cerre presented said claim for confirmation October 18th, 1811, to the board of commissioners appointed under the respective acts of Congress, approved March 2nd, 1805, and March 3rd, 1807, and said claim was rejected by said board during said year 1811.

Subsequently said claim was considered and was also presented by the legal representatives of said Cerre before the board of commissioners appointed under the act of Congress, approved July 9th, 1832, and was by said board recommended for confirmation, which confirmation was made by the act of Congress approved July 4th, 1836.

On the 6th of February, 1838, said tract having been surveyed under said last-named confirmation, the survey thereof was approved; the survey being 3067, and including the land sued for.

On May 3rd, 1869, the following patent for said land, pursuant to the act of Congress approved March 3rd, 1869, was issued to said Cerre's legal representatives:

The United States of America, to all to whom these presents shall come, greeting:

Whereas, in the act of Congress approved March 3rd, 1869, "to confirm certain private land claims in the State of Missouri," it is declared
7 as follows: That the claims of the legal representatives of Gabriel Cerre and Sophia Bolaye, falling within the exterior boundaries of the commons of Carondelet, the former entered as number sixty, for four hundred arpens, and the latter as number two hundred and seventy-nine, for one hundred and fifty arpen's, in the first class of decisions of the board of land commissioners under the acts of Congress approved ninth July, eighteen hundred and thirty-two, and second March, eighteen hundred and thirty-three, for the adjustment of private land claims in

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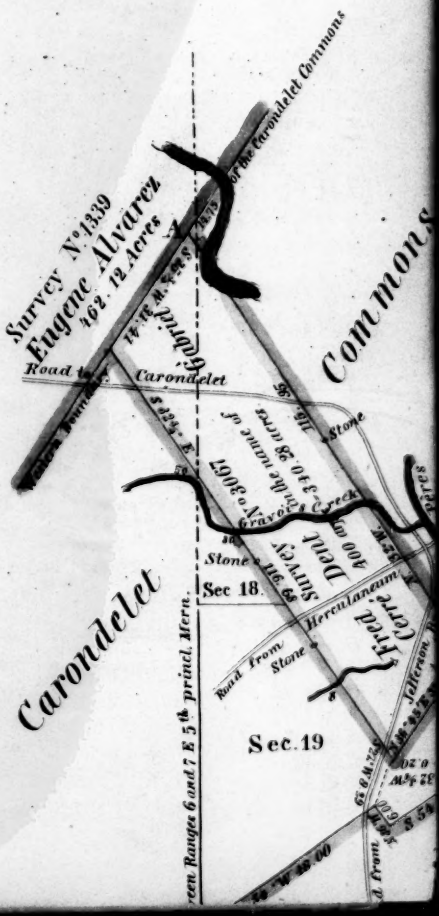
Page 7.

T 44 N. Rs 6 & 7 E 5th

Survey N° 3067



Missouri, as recommended by said board, (H. Ex. Doc. 59, 1st session 24th Congress, p. 187, and S. Doc. 16, same session, page 40,) which claims were confirmed by the act of Congress approved fourth July, eighteen hundred and thirty-six, subject to location elsewhere than in place in case of conflict, (Stat. L., vol. 5, page 126,) be, and the same are hereby, confirmed in place, subject to any valid adverse rights, if such exist, and patents for said claims shall be issued accordingly.

And whereas the aforesaid claim of the legal representatives of Gabriel Cerre has been duly surveyed according to a plat of survey certified October 1st, 1862, by the then surveyor general at Saint Louis, Missouri, which plat is on file in the general land office, said plat being accompanied by terms of description as follows, to wit:

(Here follows map, marked page 7.)

8 "Plat and description of a survey of 400 arpens equal to 340.28 acres claimed by Frederick Dent in the name of Gabriel Cerré, which was recommended for confirmation by the late board of commissioners, see their decision, No. 60, and confirmed by the act of Congress entitled 'an act confirming claims to land in the State of Missouri and for other purposes,' approved 4th of July, 1836.

"Begin at the most northern corner of the survey, which is a limestone 14 inches wide, 3 inches thick, and 24 inches long, with a cross on the top, set on the eastern line of Alvarez's survey, No. 1339, one foot in the ground, the edge eastward, from which N. 35° 45′ E. along said Alvarez's line the distance is 14.75 chains to a stone in said line on the right bank of river Des Peres; thence from said beginning corner S. 35° 45′ W. along Alvarez's line, which is a line of this survey, 31.41 chains, set a limestone on said line for a corner of this survey, which stone is 3 inches thick, 13 inches broad, and 36 inches long, set 15 inches in the ground with the edge eastward and having a cross on the top, from which a hickory, 12 inches diameter, bears S. 22½° W. 58 links distant; thence S. 32¾° E. along a line of this survey, 22.61 chains a red oak 3 or 4 inches diameter; at 30 chains is a spring S. 53 W. 150 links distant; 47.75 chains left bank of Gravois Creek 80 links wide bears eastward; 58.34 chains set a stone on the line; 75.50 chains road from Lovering's ferry on the Maramec to Saint Louis; 85.00 chains a stone set on the line at the eastern edge of a shallow pond; 95.15 chains a branch 3 links wide runs northeastward 113 chains to the road from Saint Louis to Jefferson Barracks; 116.68 chains a limestone for corner of this survey, being about 16 inches square and 4 inches thick, set 10 inches in the ground
9 with the edge westward and a cross on the top; (for connection with Chouquette's survey, No. 904, N. 32¾° W. 20 links; thence S. 27° W. 9.29 links to one of said Chouquette's corners; thence S. 36° E. 615 links to another of his corners;) thence from said corner of this survey N. 35° 45′ E. along a line of this survey, 30.91 chains, a cottonwood 20 inches diameter standing on the right bank of river Des Peres; 31.41 chains a point in said river, a corner of this survey from which a limestone 4 inches thick, 15 inches broad and 24 inches long, set a foot deep, with the edge northward, bears S. 35¾° W. 47 links distant, and a cottonwood 30 inches diameter, marked P. S. on a blaze above a notch, bears S. 59° W. 45 links distant, (found by calculation;) thence N. 32° W. along a line of this survey, 40 links, the right bank of the river aforesaid at the north bank of a small drain into said river, (there is a larger branch 3 or 4 chains southward that was omitted to be noted,) 21.00 chains; about here is the road from Saint Louis to Jefferson Barracks, 26.00 chains;

about here is the road from Herculaneum to Saint Louis, 44 chains; about here cross Gravois Creek leading eastward 58.34 chains set a stone on the line, 66 chains; about here cross a road leading eastward to Carondelet, 99 chains; about here is a high bank of river Des Peres, 110 chains; left the high bank of said river having cut a bend of said creek just to the left bank thereof, 115.95 chains, the beginning corner. Surveyed on the 16th, 17th, 18th, & 19th, days of January 1838.

"February 6th, 1838.

"JOS. C. BROWN, *D. S.*

"OFFICE OF THE
"SURVEYOR GENERAL FOR ILLINOIS & MISSOURI,
"*Saint Louis, October 1st*, 1862.

"The foregoing plat and description of survey No. 3067, are correctly copied from the plat and description of said survey recorded on
10 page 173 of record book C, on file in this office.

"W'M CUDDY,
"*Surveyor General.*"

"To THOMAS S. NELSON, Esq.,
"*U. S. Recorder of Land Titles, St. Louis, Mo.*"

Now know ye, that the United States of America, in consideration of the premises and pursuant to the acts of confirmation aforesaid, have given and granted, and by these presents, do give and grant, unto the said legal representatives of Gabriel Cerré, and to their heirs, the tract of land as above described, subject to any valid adverse rights, if such exist, to have and to hold the said tract and the appurtenances, with the stipulation aforesaid, unto the said legal representatives of Gabriel Cerre, and to their heirs and assigns forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this third day of May, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the United States the ninety-third.

By the President,
[SEAL.]

U. S. GRANT.
By J. N. BURRIT,
Secretary.

J. N. GRANGER,
Recorder of the General Land Office.

Recorded vol. 13, pages 26 to 29 inclusive.

STATE OF MISSOURI, *County of St. Louis:*

I, the undersigned recorder for said county, certify that the foregoing instrument of writing was filed for record in my office, August,
11 26th, 1869, and is truly recorded in book 383, page 628.

Witness my hand and official seal date aforesaid.

[SEAL.] JULIUS CONRAD, *Recorder.*

It was admitted that the plaintiff in this suit is the sole legal representative of said Cerre as to the land in controversy.

Under the act of Congress, approved June 13th, 1812, a survey of the outboundary lines of the commons of Carondelet was made by Elias

Rector, a deputy surveyor, prior to or in the year 1817, under instructions therefor from the office of the surveyor of lands of the United States, in the Territories of Illinois and Missouri, and the field notes of said survey and the survey were filed in said office in the year 1817, and there recorded.

On February 10th, 1834, the surveyor general of public lands for the States of Illinois and Missouri, instructed his deputy, Joseph C. Brown, to retrace the lines of said survey of the Carondelet commons as run by said Rector, reëstablish the corners, and connect the same at the proper corners with the intersecting lines of other claims and public surveys. Said survey of the Carondelet commons was retraced by said Brown accordingly, returned to the surveyor general's office, and by him approved, July 29th, 1834.

The inhabitants of Carondelet were incorporated August 20th, 1832, and Jasper Meyer made a subdivision of the Carondelet commons in 1837–'8, dividing the same into lots or blocks, irrespective of the Cerre and other tracts claimed to be within the outboundaries of said commons, except the Jefferson Barracks tract, and Chouquette tract.

December 6th, 1796, Jean B. Gamache, in behalf of the inhabitants of the village of Carondelet, presented a petition to Lieutenant Governor Trudeau, of which the following is a translation:

To M. Don Zenan Trudeau, captain of the appointed regiment
12 of Louisiana, lieutenant governor and commandant in chief of the western part of Illinois:

Considering the deplorable condition in which the village of Carondelet is now, and shall be for the future, because of the exportation of wood, the inhabitants have the honor to expose to you, that after the petition which they had the honor to present to you, the 5th day of last October, in order to obtain the continuation of their land, you told them that their demand could not take place, but yet you were going to make your last effort in order to grant them 40 arpens above their park.

They ask you to take into consideration that this mill gives now a great encouragement, and that they intend to sow as much grain as possible. Therefore they entrust Mr. Gamache with the care of presenting to you these presents, and they hope that you will take into consideration their demand, and the miserable condition in which they will be, and that you will grant them the continuation of the lands, taking as limits Caustan's land on the Mississippi side and the river Des Peres leading to the same village of Carondelet. They have full confidence in your kindness, and believing that you will grant them their demand, they will always thank you for your goodness.

his
IN. BTE. + GAMACHE.
marque.

Made at the village of Carondelet, the 6th day of December, 1796.

To which petition said lieut. governor made reply, December 7th, 1796, of which the following is a translation:

The land demanded is within the limits of land reserved for the purpose of furnishing wood necessary for the use of the village of Ca-
13 rondelet, and the demand which is made by Gamache cannot take place, nor no other concession granted in the direction of a line taken from the end of the lands of the said village, and running parallel with the Mississippi, 150 arpens further down said river.

ZENAN TRUDEAU.

ST. LOUIS, *December 7th*, 1796.

UPPER LOUISIANA, *Village of Carondelet,*
District of St. Louis, Illinois:

The inhabitants of Carondelet presented to the board of commissioners appointed under said acts of Congress, approved in 1805 and 1807, said petition and reply thereto, together with the following action by Soulard and others, as their claim to 6,000 arpen's of land situate and adjoining said village, by virtue of said alleged concession from Zenan Trudeau, lieut. governor of Upper Louisiana, dated December 7th, 1796, as follows:.

The undersigned surveyor, commissioned by the Government, to all whom these presents shall come, certify that on this day, the 21st day of December, in virtue of the order issued from the lieutenant governor to M. De Treget, captain commandant at the said village, in order to require the inhabitants to make known the *land* of a land that has been granted to them on the date of the 7th December, 1796, which line must be parallel to that of M. Auts. Reilhe, and Alvares; the said inhabitants, in presence of their commandant, have agreed to have their line drawn from the last limit posted at the extreme depth of their lands; which land had been formerly surveyed by Pr. Chouteau, in virtue of an order from the lieut. governor.

Having examined in what direction ran the same lands, I found out that they were running south 28° west. I have followed that same line 23 arpens, 3½ pr., at which distance I met the river Des Peres. The extremity of the line of the bank of the said river has been 14 bounded with a stone and two flints, as a witness, and a bullet of lead flattened. The land of Alvares must be 24 feet distant from the said boundary, in following the same line in a parallel manner; and I have delivered these presents in order that the said inhabitants could verify the same.

ANTOINE SOULARD.

ST. LOUIS OF ILLINOIS, *December* 25, 1797.

I certify everywhere it is wanted that the inhabitants of the village of Carondelet have requested me to survey, or to have surveyed by one of my deputies, a parcel of land which has been granted to them as commons by the lieutenant governor, Don Zenon Trudeau.

Mr. Barthelemy was appointed to survey the same; he went to the village of Carondelet for that purpose. In setting to mark his compass was found out of service, which event prevented the said surveying from taking place. For want of time, I have been prevented from complying with the request made to me by the citizens of the establishment of Carondelet.

In faith of which I have delivered these presents to those interested to use them as they want.

ANTOINE SOULARD,
Surveyor General T'y Louisiana.

ST. LOUIS, *February* 28, 1806.

NOTE.—The inhabitants of Vide Poche show me what they said was the outer end of their field lots, but could not find the northwest corner, I therefore measured a line between J. Menard and L. La Joye, to the southern boundary on the course of S. 56½ east 116 chains, and from thence 24 chains on the same course to the Mississippi.

The southwest corner could not be found either.

The general course of the Mississippi, for a considerable distance up and down from the point where my line intersected it, is south 42°
15 west. The courses are according to the true meridian, and the admeasurement by such a chain as the law requires.

JUNE 17, 1808.

Pursuant to an order of the honorable board of commissioners, under date of June 15th, 1808, I surveyed and measured the distance from the outer end of the field lots claimed by the inhabitants of Vide Poche, to the Mississippi, and find the distance to be 48 French arpen's, 1 French perch, 15 English feet, and 6,144–1000 of a foot.

SILAS BENT,
Principal Deputy Surveyor.

RECORDER'S OFFICE,
St. Louis, Mo., Dec. 24, 1839.

The above is a true copy taken from the original document on file in this office.

F. R. CONWAY,
U. S. Recorder of Land Titles in State of Missouri.

After the survey of said commons by said Brown in 1834, as hereinbefore stated, and the approval thereof by the surveyor general, a protracted correspondence concerning the same ensued between the land officers in Missouri and the Land Department in Washington; which correspondence terminated in 1855 by a formal approval at Washington of said survey by Brown, with certain modifications not affecting the out-boundary lines as bearing upon this suit; all of which correspondence this court refused to consider, as it held that the same was irrelevant and incompetent. There were proved to be within the exterior lines of said surveys by Brown as commons of Carondelet, the following claims, which were confirmed and surveyed by the United States, as follows:

Julian Chouquette for 640 arpen's, claim upon possession and
16 cultivation from 1798 to 1803, of which claim notice was given on the 27th June, 1808, and was confirmed under 2 sect. of act of Congress of 3rd March, 1807, by the first board of commissioners on the 25th June, 1810, and surveyed by the United States March 9th, 1838.

Gabriel Constant, jr., for 35 arpents; concession by Zenon Trudeau, lieutenant governor of Upper Louisiana, on the 4th September, 1795, and surveyed by Soulard, Spanish surveyor general, 15th April, 1796. Notice of claim was filed November 1st, 1811, and said claim was confirmed by act of Congress of 29th April, 1816, confirming the decisions of Frederick Bates, recorder of land titles of Missouri Territory, and surveyed by the United States in March, 1834.

Pierre Delor De Traget for 400 arpents; concession by Zenon Trudeau, lieutenant governor, December 6th, 1796. Notice of claim for confirmation given on the 27th November, 1812, and confirmed by act of Congress of 4th July, 1836, entitled "An act for confirming claims to land in the State of Missouri and for other purposes," and was surveyed by the United States February 20th, 1837.

John B. Martigny for 12 arpents in front by the ordinary depth; concession by Francisco Cruzat, lieutenant governor of Upper Louisiana, 25th April, 1783. Claim included in the general notice given, and confirmed by said act of 4th July, 1836, and surveyed by the United States 11th and 12th May, 1838.

Sophia Bolaye, for 150 arpents; concession by said Zenon Trudeau, lieutenant governor, on the 3rd June, 1796. Notice of presentation of said claim for confirmation filed 22nd September, 1812, before recorder of land titles. Rejected by recorder and confirmed by said act
17 of 4th July, 1836, and surveyed by the United States in January, 1838, upon which a patent issued by the United States under act of Congress of March 3rd, 1869.

Eugene Alvarez for 640 arpents; concession by Zenon Trudeau, lieutenant governor, on the 18th November, 1796. Notice of presentation of claim for confirmation 12th August, 1807, and confirmed by first board of commissioners, January 6th, 1812, and surveyed by the United States on the 22nd and 23rd November, 1811. This confirmation of Alvarez is outside of the said survey of Carondelet.

The location of all these claims and confirmations as surveyed by the United States appears upon the following plat:

(Here follows map, marked page 17.)

18 The defendants claim title to the land sued for, as part of the commons of Carondelet, and have also whatever title was in Carondelet prior to July 4th, 1836.

Said acts of Congress approved in 1805 and 1807; also, the acts of June 13th, 1812, May 26th, 1824, May 22nd, 1826, (6 U. S. St. at Large, 355,) May 24th, 1828, January 27th, 1831, (4 U. S. St. at Large 435,) July 9th, 1832, July 4th, 1836, and of March 3rd, 1869, (U. S. St. at Large 458, ch. 163,) were offered in evidence, and fully considered by the court, and as it was agreed by counsel in this cause that the same might as if herein recited be deemed a part of this finding as fully as if set out in hæc verba, and be referred to in all matters pertaining to this cause, either in this or the U.S. Supreme Court, from the printed volumes of U. S. Statutes, so far as the same are private statutes; the provisions of none of said acts of Congress are accordingly herein expressly recited, but held to be a part of this special finding, so far as the same are private statutes.

As the question of title in this cause is between plaintiff's confirmation by the act of July 4th, 1836, and the defendant's title under Carondelet by force of the acts of 1812, and 1831, and as under the special finding of facts heretofore recited, the court is of opinion that this cause is fully within the adjudications by the United States Supreme Court in similar cases.

The court holds that the plaintiff is not entitled to recover; because the title to the lands in question is in the defendants who hold the Carondelet title.

And afterwards at said regular stated term of said circuit court begun and holden as aforesaid, the following further proceedings
19 were had in said case on Saturday, the 5th day of November, A. D. 1870, to wit:

GEORGE W. DENT, PLAINTIFF,
ag'st
FRANZ EMMEGER ET AL., DEFENDANTS. } Ejectment.

Bill of exceptions filed.

This day comes the plaintiff, by attorney, and files his bill of excep-

tions in this case, which being examined by the court, is signed and sealed, and order' to be made part of the record herein.

Which bill of exceptions filed as aforesaid is in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States, for the districts of Missouri.

GEORGE W. DENT, PLAINTIFF,
against
FRANZ EMMEGER AND CATHERINE GRAHAM,
defendants.

Be it remembered that on the trial of the above cause the plaintiff offers in evidence, in rebuttal, the following documents, to wit:

1. Letter of the Commissioner of the General Land Office to Surv. Gen'l Milburn, dated 24th Sept., 1839, as follows:

GENERAL LAND OFFICE, *Sept. 24th*, 1839.

A plat of a survey, No. 3102, certified by you on the 18th of May last, of the common of Carondelet, as surveyed by Joseph C. Brown, deputy surveyor, in March, 1839, with your communication of that date to Arthur L. Magenis, esq., U. S. district attorney, and a transcript from page 6 of register D, arpentage, St. Louis, A, have been received at this office, with a letter of the 22nd June last, from the Secretary of War.

20 The subject is brought to the attention of this office, by the Secretary of War, with a view, as appears from the communication, that this office should take measures to sell the land included within the lines marked with red in the accompanying plat, (the plat above referred to,) from the river Des Peres south, claimed as common by the village of Carondelet, but believed to belong to the United States.

In the communication it is also stated that the military reservation, desired for the United States around the fort at Jefferson Barracks, will be designated whenever the land office is prepared to sell the residue of this tract of land.

On this subject I herewith enclose a copy of a report, No. 244, of the Solicitor of this office, in which you will perceive that he is of opinion that Brown's survey within the limits of which are six private claims, includes several thousand acres to which the village of Carondelet has no legal or equitable title, and if such is the fact there is no objection to a survey and sale as public land, of all that part of the tract not needed for military purposes or covered by private claims. Indeed that is the proper course to pursue—that instructions should be given to the surveyor general to have the survey executed as required by law, (act of June 13th, 1812, page 216, part 1st, laws and instructions, &c., to which the acts chap. 311 and 406 are supplementary,) viz, to retrace the exterior of the village, including the village lots, common field, and out lots, and commons, giving the villages the same lines which they had in 1803, and, after laying down the private claims, to section and subdivide the residue and return the official plat, that the surveyor general should refer to the ancient maps and title papers, in his and the record-

21 er's office, and from them ascertain what were the exterior lines, &c.

Concurring in the views of the solicitors, as stated, I request you will make a thorough and careful examination into the whole matter, in order to determine the limits of the commons of Carondelet, to which the villagers are legally entitled, and that you will cause a survey to be made accordingly, and that such lands as may not be found to be within the limits of the commons aforesaid, or covered by private claims, may be surveyed as public lands, and plats of the same duly returned.

You are requested to make a detailed report of all your proceedings, accompanied by copies of all the papers or records that you may be able to find having a bearing on the claim in question, with a diagram exhibiting the limits of the commons according to the evidence of title.

Very respectfully, your obedient servant,

JAMES MICHAN,
Commissioner.

WILLIAM MILBURN, Esq'r,
Surveyor General, St. Louis, Mo.

2. Letter of the Solicitor of the Treasury to the Commissioner of the General Land Office, dated August 16th, 1839, as follows:

GENERAL LAND OFFICE, *August 6th*, 1839.

Solicitor Bureau.]

SIR: In a letter of the 22nd June, the Secretary of War requests you to take measures to sell the land south of the river Des Peres, claimed as commons by the village of Carondelet, but believed to belong to the United States. Accompanying the reference there is also an opinion of the district attorney for Missouri, and sundry papers. The act of June 13th, 1812, P. J., page 216, confirms the rights, titles, and claims to town or village lots, out lots, common field lots and commons in, 22 adjoining, and belonging to the village of Carondelet, which lots have been inhabited, cultivated, or possessed prior to the 20th of Dec., 1803, and makes it the duty of the deputy surveyor (when the same had not been already done) to survey the out-boundary of the village, so as to include the out lots, common field lots, and commons, thereto belonging, and to transmit a plat of the survey to the surveyor general to be forwarded to the General Land Office. Two supplementary acts have been passed, (chap's 311 and 406,) but as they do not seem to touch the merits of the present enquiry, further reference is deemed necessary. The act of 1812 and the supplementary acts quoted dispose of all the lands included within the exterior limits, which the deputies were required to run by the act of 1822. A copy of the plat of the commons of Carondelet, as surveyed by Brown, deputy surveyor, in March, 1834, under the instructions of the surveyor general of the 10th of February, 1834, authorizing him to retrace the lines and establish the corners of the former survey thereof, and has been furnished by the surveyor general, which shows that Brown's survey extends south of the river Des Peres, so as to enclose several thousand acres of land and to include with the exterior six private claims, three of which are confirmed by the act of 1836. These concessions furnish evidence that the land in question was not regarded by the Spanish officers as parcel of the village common, because they were all forbidden to grant village commons, and the legal presumption is that they obeyed the instruction, and that, therefore, this land was not a common, but public domain.

The title which the inhabitants have exhibited to the land south of

the river Des Peres, is the statement of Governor Trudeau, (dated Dec. 7, 1796,) rejecting a petition of Gamache praying for a grant of land below the village, which states that "no concession can be made in the direction of a line taken from the end of the field lots of the
23 village, and running parallel with the Mississippi, and further down said river one hundred and fifty arpen's," "because the same is within the limits of the land reserved for the purpose of furnishing wood for the village." This was shown to the board of commissioners for adjusting titles, and accompanied with proof that the inhabitants cut wood below the village for many years, &c., (2 Am. State Papers, 549,) but the claim was rejected. It appears from a transcript of a survey made Feb. 25, 1797, of a tract conceded to the inhabitants Sept. 7th, 1796, that the south line of the grant is bounded by the river Des Peres. The survey being made subsequent to the rejection of Gamache's petition, if it be, as is supposed, a survey of the commons, will overrule any inference to be drawn from the expression used by the governor in refusing the prayer of Gamache. My belief is that Brown's survey includes several thousand acres to which the village of Carondelet has no legal or equitable title, and of the same opinion is the district attorney of Missouri. If such is the fact, there is no objection to a survey and sale, as public land, of all that part of the tract not needed for military purposes, or covered by private claims—indeed, that is the proper course to pursue. I advise giving instructions to the surveyor general to have the survey executed as required by law, viz., to retrace the exterior of the village, including the village lots, common fields, and out lots, and commons, giving the villagers the same lines which they had in 1803, and no more, unless prior to the act of 1812 the corporate limits had been fixed and extended beyond the limits of 1803, and after laying down the private claims, to section and subdivide the residue, and re-
turn the official plats. The surveyor general shall refer to
24 the ancient maps and title papers in his and the recorder's office, and from them ascertain what were the exterior lines of the just claim in 1803. It will be best to require copies of the papers and a report from him.

I am, &c.,

M. BIRCHARD, *Solicitor.*

To JAMES WHITCOMB, Esq.,
Commissioner, &c., &c.

3. Letter of Surveyor General Milburn to trustees of Carondelet, dated 5th December, 1839, as follows:

SURVEYOR GENERAL'S OFFICE,
St. Louis, 5th of Dec., 1839.

SIR: Inclosed herewith for the information of the corporate authority of the town of Carondelet, the copy of a letter dated 24th of September, 1839, from the Commissioner of the General Land Office, in relation to the land embraced in the survey of the Carondelet common south of the river Des Peres, and also the opinion of the Solicitor of the General Land Office on the same subject. As it is my wish to report to the Commissioner of the General Land Office without delay, I have to request that any information which the trustees may desire to furnish be handed in at their earliest convenience.

I am, sir, very respectfully, your ob't servant,

W'M MILBURN, *Surveyor General.*

NICHOLAS POPE, Esq.,
Chairman of the Board of Trustees of the town of Carondelet.

4. Letter of Surveyor General Milburn to United States recorder of land titles, dated 14th December, 1839, as follows:

SURVEYOR GENERAL'S OFFICE,
St. Louis, 14th Dec., 1839.

SIR: I am instructed by the Commissioner of the General Land Office to make a thorough and careful examination of the claims of the inhabitants of Carondelet to commons, and to report to him in detail all my operations. To enable me to comply with this instruction,
25 I have to request a copy from the records of your office of all the documents relating to said common which have not heretofore been furnished this office. The only paper which I find on file here from your office, having a direct bearing on the subject, is a copy of the notice to the recorder, and the accompanying papers, from pages 195 and 196 of record book D. The papers in this office which have an indirect bearing, are those relating to the grants and confirmation of the following claims:

Eugene Alvarez's certificate, 1339, } Of the old board of commissioners.
Julien Chouquette's " 904, }
Gabriel Constant's confirmation for 25 arpents, by the act of Congress of 29th of April, 1816.
Gabriel Cerre's decision, 60, }
Treget Delor's " 121, } Of the late board of commissioners, and
J. B. Martigny's " 170, } confirmed by the act of 4th July, 1836.
Sophia Borlage's " 279, }

These papers are defective in the following particulars:

1st. Those which relate to the claims of Alvarez, Chouquette, and Constant are mere abstracts of the confirmations, and contain nothing whatever concerning the origin of the titles, either with the Spanish or United States governments, nor of the evidence upon which the confirmations were founded.

2nd. Your certificate of decisions, No. 60, 170, and 279, of the late board of commissioners, seem to contain copies of all the proceedings which had been had thereon; but the certificate of the confirmation under decision number 121 gives nothing more from your records than the plat and notes of a survey by Joseph C. Brown.

You will please to make good these defective papers, and fur-
26 nish me with such other information as your records afford that is in any way whatever connected with the claim to the common of Carondelet.

I am, very respectfully, sir, your ob'd't servant,

W'M MILBURN.
Surveyor General.

F. R. CONWAY,
United States Recorder of Land Titles
for the State of Missouri, St. Louis.

5. Letter of Surveyor General Milburn to Commissioner of the General Land Office of 29th February, 1840, as follows:

SURVEYOR'S OFFICE, *St. Louis, 29th Feb.*, 1840.

SIR: I could not, consistent with the then pressing duties of this office, take up the subject of the Carondelet common, required by your letter of the 24th of Sept., until some time in the last part of the month

of November. Upon examining the matter, I consider it right and proper to inform the corporate authorities of the village of what was intended, and accordingly addressed a note, of which the enclosed paper numbered 1 is a copy.

I received for answer a note, and enclose you a copy thereof, numbered 2. As they asked me to withhold any final action or report on the subject until they communicated all the information they could state, it was, in my opiuion, due to them, as a matter of courtesy, to give ample time, even much more than I might consider necessary, to prepare the intended statement.

Their report or statement, dated the 12th inst., was received a short time back, and the business will now be attended to at an early day. This information is given with reference to your letter of the 13th inst., calling my attention to the subject.

I am, very respectfully, sir, your obed't servant,

W'M MILBURN,
Surveyor of the Public Lands in the States of Illinois and Missouri.

JAMES WHITCOMB, Esq.,
Commissioner of the General Land Office, City of Washington.

27 6. Letter of Secretary of War to General Adkinson, dated the 16th November, 1840, as follows:

WAR DEPARTMENT, *Nov. 16th*, 1840.

SIR: I transmit herewith a copy of the letter from the Acting Commissioner of the General Land Office, of the extract from the report of the Solicitor of that office, and of the plat X, referred to by the acting commissioner. You will perceive that this office confirms the report of the Solicitor, and that the latter is of the opinion that the village of Carondelet has no legal claim to the land called the commons of that village, but that it has so strong an equitable claim to a portion of it, Congress will probably sanction it. And he advises that a portion of it, which he designates, be reserved for the future action of Congress.

The part thus recommended to be reserved would allow 5,004 20-100 acres for a common for the village of Carondelet, which is the extent for its claim, and 1,702 for a site for Jefferson Barracks and for military purposes connected with it. You will please cause this latter quantity to be laid in such direction as would be most useful to that post, and as would best answer for the general military purposes connected with it.

You will cause a plat to be made of it, and forward it to this office as early as practicable.

Very respectfully,

J. R. POINSETT.

Brig. Gen. H. ATKINSON,
Jeff. Bar., St. Louis, Missouri.

7. Letter of Secretary of War to Commissioner of the General Land Office, dated November 18th, 1840, as follows:

WAR DEPARTMENT, *Nov. 18th*, 1840.

SIR: I return you the plat of the commons of the village of Ca-
28 rondelet, which accompanied your letter of the 11th inst., and for the information of your office I endorse you a copy of the instructions given to General Atkinson to lay off and transmit a plat of

of November. Upon examining the matter, I consider it right and proper to inform the corporate authorities of the village of what was intended, and accordingly addressed a note, of which the enclosed paper numbered 1 is a copy.

I received for answer a note, and enclose you a copy thereof, numbered 2. As they asked me to withhold any final action or report on the subject until they communicated all the information they could state, it was, in my opiuion, due to them, as a matter of courtesy, to give ample time, even much more than I might consider necessary, to prepare the intended statement.

Their report or statement, dated the 12th inst., was received a short time back, and the business will now be attended to at an early day. This information is given with reference to your letter of the 13th inst., calling my attention to the subject.

I am, very respectfully, sir, your obed't servant,

W'M MILBURN,
Surveyor of the Public Lands in the States of Illinois and Missouri.

JAMES WHITCOMB, Esq.,
Commissioner of the General Land Office,
City of Washington.

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WAR DEPARTMENT, *Nov. 16th*, 1840.

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The part thus recommended to be reserved would allow 5,004 20-100 acres for a common for the village of Carondelet, which is the extent for its claim, and 1,702 for a site for Jefferson Barracks and for military purposes connected with it. You will please cause this latter quantity to be laid in such direction as would be most useful to that post, and as would best answer for the general military purposes connected with it.

You will cause a plat to be made of it, and forward it to this office as early as practicable.

Very respectfully,

J. R. POINSETT.

Brig. Gen. H. ATKINSON,
Jeff. Bar., St. Louis, Missouri.

7. Letter of Secretary of War to Commissioner of the General Land Office, dated November 18th, 1840, as follows:

WAR DEPARTMENT, *Nov. 18th*, 1840.

SIR: I return you the plat of the commons of the village of Ca-
28 rondelet, which accompanied your letter of the 11th inst., and for the information of your office I endorse you a copy of the instructions given to General Atkinson to lay off and transmit a plat of

that part of the tract embracing 1,702 acres, which the Solicitor of your office is of the opinion may properly be retained for military purposes. As soon as the plat shall have been received from Gen. Atkinson, a copy of it will be furnished you.

Very respectfully, your most ob'd't servant,

J. R. POINSETT.

JAMES WHITCOMB, Esq.,
Com. Gen'l Land Office.

8. Report of Solicitor General Land Office, McRoberts, dated Oct. 22nd, 1840, as follows:

GENERAL LAND OFFICE, SOLICITOR'S BUREAU,
October 22nd, 1840.

SIR: The surveyor general of Illinois and Missouri has, in pursuance of the directions contained in your letter of the 24th Sept., 1839, submitt*ing* a report, with various accompanying documents, upon the claim of the inhabitants of the village of Carondelet, in the State of Missouri, to a tract of land lying south of the river Des Peres, as a common. I have examined this report and the accompanying evidence and exhibit, and submit the following as the result of this examination:

On the 22nd June, 1839, the Secretary of War addressed a letter to the Commissioner of the Gen'l Land Office, enclosing a letter from the surveyor general of Missouri and plat of survey, and requested that measures be taken to sell the land lying south of the river Des Peres, as designated on the plat, and which was claimed as common by the village of Carondelet, but which he believed belonged to the United States.

The subject was referred to Judge Burchard, the Solicitor,
29 who reported that several thousand acres of land, included in Brown's survey of the common, was public property, to which the citizens of Carondelet had no legal or equitable claim, and that the same, with the exception of the part needed for military purposes and the portion included in private claims, should be surveyed and sold as public land. The district attorney of Missouri has also given an opinion against the validity of the claim to common of the tract of land lying south of the river. The surveyor general entertains a different opinion, as appears from his report dated 15th of April, 1840.

The subject is one of great importance, looking to the amount of property, and still more so as it respects the principles involved in the decision. The claims to lands designated as commons in favor of the inhabitants of Carondelet, be it little or much, depends upon the act of Congress approved 13th of June, 1812, 1st volume laws and instructions, chap. 140, the first section of which provides that the rights, titles, and claims to town or villages Portage Des Sioux, St. Charles, St. Louis, St. Ferdinand, Villa a Robert, Carondelet, St. Genevieve, New Madrid, New Bourbon, Little Prairie, and Arkansas, in the Territory of Missouri, which lots have inhabited, cultivated, and possessed prior to the 20th day of December, 1803, shall be, and the same are hereby, confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto.

The act then contains a proviso, excepting from its operation any claim or claims to the same lands, or any part thereof confirmed by the board of commissioners. The 2d section also gives the President the power to reserve certain portions of such lands for military purposes.

On the 27th of January, 1831, Congress passed another act, (same vol.,

ch. 406,) which declares that "the United States do hereby
30 relinquish to the several towns and villages of Portage Des Sioux, St. Charles, St. Louis, St. Ferdinand, Villa a Robert, Carondelet, St. Genevieve, New Madrid, New Bourbon, and Little Prairie, in the State of Missouri, all the rights, title, and interest of the United States in and to the town or village lots, out lots, common field lots and commons, in, adjoining, and belonging to the said towns or villages, confirmed to them respectively by the first section of the act of Congress passed 13th June, 1812, to be held by the said inhabitants of said towns and villages in full property, according to their several rights therein, to be regulated or disposed of for the use of the inhabitants, according to the laws of the State of Missouri."

This last act, which was approved the 27th January, 1831, confers no new or additional rights. It is nothing but a bare relinquishment from the Government of the land confirmed to the several towns and villages by the act of June 13th, 1812.

Indeed, it is difficult to perceive what object was contemplated by the act of 1831, unless it was to acknowledge a right in the State of Missouri, to pass laws for the final disposition of the property, and especially the school lands referred to in the 2d section. The act of 1812 being the foundation of this claim by the inhabitants of Carondelet, we will proceed to examine its provisions, together with the evidences of right to this common.

The act does not, as seems to have been supposed, confirm all claims to lots, or all claims to commons; on the contrary, it virtually negatives mere claims not founded in right. It confirms the title to the land and not according to the claim, but according to the several right or rights, titles and claims to the party. These are the words: That the
31 rights, titles, and claims to the town or village lots, out lots, common field lots and commons, &c., &c., "are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto."

Here we have rights, titles, and claims confirmed, but not indiscriminately.

They are confirmed only according to "*to* their several rights," or according to their rights in common thereto.

The act does not say that these lands shall be confirmed according to the "claim" of the parties—not at all; but it expressly enacts that it confirms claims according to the "right or rights" of the claimant or claimants, and not otherwise.

Had the act of 1812 read thus: "That the rights, titles, and claims to town or village lots, out lots, common field lots and commons," &c., "are hereby confirmed to the inhabitants of the respective towns and villages aforesaid," and no other word, the case would then have been clear.

The mere naked claims would have been confirmed.

If Congress had intended to confirm such, would not the enactment have been expressed in the very words as stated?

But Congress intended no such thing, because in the enacting clause of the statute, and as a very material part it, *it* added, "according to their several right or rights in common thereto." By confirming the title to lands according to rights, it negatives all those not founded in right. The rule is well illustrated by the maxim, "expressio unius est exclusio alterius." But it may be asked why the terms "rights," "titles," and "claims" inserted in the act, if Congress did not mean to
32 confirm them all, and what was meant by "rights, titles, and claims?" This is the answer. Congress was legislating in regard to

property that had belonged to two other governments, France and Spain. These governments had adopted rules for the disposition of the public domain. In some instances absolute grants had been made. The fee simple had passed, and Congress merely recognised and affirmed that, which, by the treaty and the law of nations, was already absolute.

Other cases existed where the title had not been perfected, but where the claimants had complied with their agreements, and with the laws and usages of the government, previous to the session of Louisiana to the United States, and where good faith and strict justice required that the titles and claims should be perfected. It was for the confirmation of such rights, titles, and claims that this act of Congress was passed. Claims not founded in right or stained with fraud, are not claims within the meaning of the law, and were never contemplated.

The construction that the lands were to be confirmed according to right, makes the case intelligible. It is rational. It opens the door to investigation, in order that the Government and individuals may have a full and impartial hearing. But to contend that all clauses, however vague and unfounded, are embraced by this act of Congress, makes the case irrational, because it precludes investigation; nay, more, such a construction would subvert the obvious intent of its makers and the principles of universal justice. I therefore conclude that no claim was confirmed by the act of June 13th, 1812, except those founded in right.

33 The next inquiry is, has the claim to common by the citizens of Carondelet to the land lying south of the river Des Peres, any foundation in right?

Before proceeding with the enquiry it is proper to remark, that there is no evidence of any grant of this land to the village of Carondelet for common, or any other purpose, by the Spanish authorities.

On the 6th Dec., 1796, John B. Gamache presented a petition to the lieut. governor, Zenon Trudeau, in which he states "that, after the petition he handed to you on the 5th of October last for the purpose of obtaining the continuation of their lands, (meaning the inhabitants of Carondelet,) you told him that, although you could not accede to his demand, you would, however, make your efforts to grant him 40 arpen's above the parc." The petition then proceeds to inform the lieut. governor that he has a mill, and prays for a grant of land to himself, to be bounded by the land of Mr. Constant, the Mississippi, and the river Des Peres, and the village of Carondelet.

Upon this petition Mr. Trudeau made the following endorsement:

"The land which is asked for is included in that which has been reserved to furnish the wood necessary to the village of Carondelet, and the demand made by Mr. Gamache, as well as all concessions granted in the direction of the line beginning at the end of the lands of said village, and running parallel to the Mississippi, one hundred and fifty arpen's lower down, cannot be admitted.

"ST. LOUIS, *the 7th December*, 1796."

What became of the petition of the 5th of October does not appear. Its object seems to have been a direct application for an
34 extension of the village common, and was refused

On the 25th of December, 1797, Antoine Soulard made this certificate:

"We, the undersigned, a surveyor commissioned by the government, do certify to all to whom it shall appertain that, on the 21st of Dec., in virtue of the order transmitted by the lieutenant governor to Mr. De

Freget, captain commandant of the said village, enjoining upon the inhabitants to make known the line of a tract of land which was conceded to them on the 7th of De., 1796, which line must be parallel with those of Mr. Ante Reilhe Alvarez. The said inhabitants, in presence of their commandant, have agreed upon causing their line to be drawn from the last bound, placed at the extremity of the depth of their lands, which had been formerly surveyed by Mr. Pierre Chouteau, in virtue of an order from the lieut. gov. Having taken the bearing course of the same lands I found that they ran S. 28° W.; I followed this same course 23 arpen's 3½ poles, at which distance I intersected the river Des Peres; the end of the line on the bank of the same river has been bounded with a stone, having for witness two flint stones and one flattened lead bullet. The land of Mr. Alvarez must be distant from the said stone, bound 24 feet in following the same line parallel; and, in order that the said inhabitants may prove the same I have delivered these presents.

"ANTOINE SOULARD.

"ST. LOUIS OF ILLINOIS, 25*th December*, 1797."

On the 18th February, 1806, Mr. Soulard made out a certificate that the inhabitants of Carondelet had requested him to measure for
35 them "a portion of land which was granted to them as a common by the lieut. gov. Don Zenon Trudeau;" that Mr. B. Cousin was to have made the survey, but when he went to the place his compass was out of order, and he failed to make the survey, and that his own engagements had prevented him from doing it.

This certificate was made several years after the change of government; was not under oath; was not authorized by any law, and gives no description to the land. It is, therefore, not such a paper as can be of any service in the examination of the case. For the purpose of making out a claim to commons, sundry ex parte affidavits have been made by citizens of Carondelet, and which the surveyor general has included with his report. These affidavits state that the inhabitants have been in the habit of procuring rails, wood, hay, &c., from the land claimed, or part of it, for a considerable length of time, some of them say as much as forty or forty-five years. They all speak of the survey made by Mr. Soulard, the 25th of December, 1797, and which terminated at the river Des Peres.

In the affidavits it is also stated that Mr. Soulard proceeded no further than the river before named, in consequence of high water. Louis Courtois, sen'r, testifies: "They, the inhabitants of Carondelet, claimed and used as their commons from what is called Sugar Loaf, (understood to be a mound,) about two miles north of the village of Carondelet, to said village, and to their common field."

He also testifies that the lieut. gov., Trudeau, granted them 150 arpen's, extending south from the common field, and running parallel with the Mississippi, and that the survey of Mr. Trudeau was not continued south of the river Des Peres, because of high water.

36 The affidavit also contains this passage: "I know that, after the survey of Mr. Soulard—that is, by him begun and not finished—that the inhabitants of Carondelet themselves, either by order of Zenon Trudeau or Antoine Soulard, went and continued running a line south of river Des Peres, and blazed the same to the extent they claimed."

Other persons speak of a blazed line being found when Mr. Rector made the first survey in 1821; and they also speak of a grant made by Lieut. Gov. Trudeau, of this common to the inhabitants of Caron-

delet. They also say that this line, blazed by themselves, was made during the time of the Spanish government, &c. I have copied the exhibits herein for the purpose of presenting a full view of their claims, as made by the claimants themselves. We will now proceed to examine the exhibits and papers.

The ex parte affidavits all speak of a grant made by Lieut. Gov. Trudeau, and they also refer, in the clearest manner, to his order endorsed upon the petition of Gamache, and it is to that that they refer when they speak of grant. For example, the affidavit of Peter Delor, sen'r, contains the following passage:

"They (the inhabitants of Carondelet) claimed north of the river Des Peres, and used as their commons as far as what is called Sugar Loaf, about two miles north of the town."

Q. "Do you know that the claim of commons extended south of the river Des Peres?"

A. "Yes. I remember that, in the year 1796, a petition was presented to Mr. Zenon Trudeau, by Mr. John B. Gamache and myself, in behalf of the inhabitants of Carondelet, for a continuation of their land,
37 to which petition Mr. Trudeau made the following reply: That he could not give us the continuation of our land; but, seeing the industry of the city of Carondelet in fencing round their fields, he would grant them 150 arpen's further down, beginning at the S. W. line of their common fields, and a direct south course, parallel with the river 150 arpen's, which was granted, as aforesaid, by said Trudeau, under his hand the same year."

I have copied this paper to show the impression of one of the inhabitants interested in sustaining the claim. He says that when the petition was presented to Lieut. Gov. Trudeau for a continuation of the commons that he said he could not give them the continuation of the land, but would give them 150 arpen's, running a direct south course, parallel with the river, and then that Mr. Trudeau made the grant under his hand the same year. The petition to Mr. Trudeau and his answer have been heretofore quoted.

In the petition of Mr. Gamache of the 6th of October, 1796, he makes a reference to another petition which had been presented on the 5th of October, and the prayer of which had been refused. It must be that to which Mr. Delor refers in his affidavit. Mr. Delor refers expressly to Gamache and himself as having made application, and then adds that the 150 arpen's south were granted by Mr. Trudeau the same year. The witnesses appear to be illiterate, and which accounts for their statements that Lieut. Gov. Trudeau made a grant of the land.

There is no grant whatever to the inhabitants of Carondelet of the land now claimed; for commons or for any other purpose.

The endorsement of Trudeau upon Gamache's petition is not a
38 grant. He refused to grant the land for a common when the application was direct for that purpose in October, 1796.

In Dec., 1796, when Gamache applied for a part of the same land, he endorsed upon his petition that the land applied for had been "reserved to furnish the wood necessary to the village of Carondelet."

This declaration manifests an intention, on the part of Gov. Trudeau to withhold the land for that purpose and not to make any grants to individuals within the same. He seems to have refused to make any grant of the premises, either to the inhabitants or the individuals. He refused to make a grant the 5th of October of the land, and his not having executed any grant to the village shows most conclusively that this tract of land was not severed from the public domain, and that it

continued and was part of the domain of the king at the date of the cession.

The next piece of evidence which has been adduced in support of the right to the land as a common, is the certificate of Antoine Soulard, the surveyor general, which has been copied in the preceding part of this report. In this certificate Mr. Souland states that, in pursuance of an order of Lieut. Gov. Trudeau, of the 7th Dec., 1796, and which corresponds precisely with the date of the endorsement of Trudeau upon Gamache's petition, and in which the inhabitants were enjoined to make known their lines, &c., he made a survey as agreed upon, from the extremity of their land as surveyed by Mr. Chouteau; that the bearing was found to be S. 28 W.; that he run the line to the river Des Peres, being 23 arp's, 3½ poles; that the end of the line was noted by stones and a leaden bullet, &c. Why Mr. Soulard did not proceed with the survey, if he was in fact to have proceeded further, does not
39 appear from his certificate. The ex parte affidavits say it was on account of high water, but Mr. Soulard gives no intimation of any such obstruction. Had that or any other cause prevented the completion of the survey, he could hardly have omitted to state it. His certificate, made in due form, proves a survey, made by the consent of the inhabitants and their commandant, to the river Des Peres, with the course and distance. He speaks of an order from Mr. Trudeau for this survey, but does not state what extent the survey was to be. If we judge from his acts, he was certainly limited to the tract north of the river Des Peres.

The order referred to is not produced, nor is there any record of it; and it is inadmissible to infer from the ex parte affidavits that this order directed the survey south of that river.

In the year 1808, this clause was presented to the board of commissioners of St. Louis, for 6,000 arpen's.

In the testimony then taken nothing was said about this survey of Soulard extending south of the river, or that any order or grant authorized such extension.

The survey of this land was first made by Mr. Rector, in 1832, (1821;) the lines were retraced by Mr. Brown.

Upon what principles Mr. Rector made this survey, so as to comply with any claim which had ever been made to this common, is wholly inconceivable. His survey is a total departure, not only from the survey of Soulard, but also from the claim of the inhabitants, and from the order of Trudeau reserving the land.

Soulard certifies that he made his survey running south 28° west to the river Des Peres. Rector has run 35° 30′ west, the whole
40 length of Alvarez' line, and the balance of the distance he has run south 36° 20′ west, which is a variation of between 7 and 8 deg's for upwards of five miles.

The oral testimony of all the witnesses is that Mr. Trudeau promised them or granted them 50 arpen's, running south, and parallel with the Mississippi.

In the order which Mr. Trudeau endorsed on Gamache's petition, he says, "All concessions in the direction of a line beginning at the end of the lands of said village, and running parallel to the Mississippi 150 arpens lower down, cannot be admitted," &c., yet, in despite of all this data of claim, the survey is made not to run parallel with the Mississippi, nor due south, but to run 36° 20′ west of south.

This is not all; the inhabitants never claimed more than 6,000 arpen's at any time, which is 5,104$\frac{20}{100}$ acres, but the surveyor did not confirm

himself to that quantity. He has surveyed for them 9,905$\frac{29}{100}$ acres, which is nearly double the quantity claimed.

The surveyor general in his report, dated the 15th of April, 1840, says:

"You will see that my construction of the law is distinctly in favor of the village to the extent of 150 arpen's, from southwest corner of the field lands; and were there no controlling circumstances, I would not hesitate to run the west boundary as represented by the black dotted lin' e d on the plat X, which is 150 arpen's, parallel to the general course of the Mississippi."

He then proceeds to detail his reasons for not running the line as stated: "These are founded," as he says, "upon the operation of
41 Soulard in running the lines C E on the plat X, north of the river Des Peres, and the Spanish calls for the limits and commons of Carondelet, in the claims of Alvarez and Valle, upon the intention of the Spanish government, and upon the act of Congress of June 13th, 1812."

From all this I respectfully dissent. I can neither accord in the premises nor in the conclusion of the surveyor general.

1st. The survey of Soulard to the river, his establishing his corner, and executing a certificate of the fact, does not prove that he was to make any survey south of the river; and if it did, it could not establish the fact that he was to run south 26° 30 west for upwards of five miles, in direct violation of Trudeau's order, upon Gamache's petition.

2nd. The calls for common in the claims of Alvarez and Valle cannot change the explicit terms used by Trudeau, and which are these: "Beginning at the end of the village and running parallel to the Mississippi."

3rd. The intention of the Spanish government to extend this line according to Rector's survey is negatived by Trudeau's order, and by the omission of the government to make any grant or to cause any such survey to be made.

4th. The language of Soulard, in making the survey north of the river Des Peres, "that the line must be parallel with those of Mr. Antoine Reihle and Alvarez, and that the land of Mr. Alvarez must be distant from the said stone 24 feet," meaning, thereby, the corner he established on the north side of the river, surely does not prove that such course was to be followed south of the river, much less does it show that he was to make any survey whatever south of the same.

5th. The act of Congress never intended to confirm clauses not
42 founded in right, and no inference can be drawn from it in any degree favorable to the claim under consideration.

From a full examination of the subject, I have come to the conclusion that the land included in the survey of the commons *were* not granted by the Spanish government to the inhabitants of Carondelet for the purpose contemplated, nor for any other purpose, and that the endorsement of Lieutenant Governor Trudeau upon Gamache's petition was not a grant of the land, and can only be treated as an intention to reserve a part of the *river* south of the river—in his own words, "to furnish wood necessary to the village of Carondelet," and that the fee-simple in the soil did not, and was not intended to, pass out of the Spanish crown, and that the title to the land was in the crown at the date of the cession, and as such passed to the United States.

2. That the act of Congress of June 13, 1812, did not confirm the land, as surveyed by Mr. Rector, to the village of Carondelet, nor was it effected by the act of January, 1831.

I, however, believe that good faith to the citizens of Carondelet, and in fulfilment of what they were led to believe was the intention of Lieut. Governor Trudeau to do in the premises, that Congress will make a grant of some portion of the lands for the purpose contemplated.

I therefore advise that the tract of land beginning on the Mississippi River, at the figure 6, laid down upon plat X, and near the northeast corner of Martigny's survey, thence with the black dotted line to d, thence with said line to the river Des Peres, and up the river to Alvarez,
survey, and across the river to letter e, and from said letter e to c,
43 and on to the river with the present survey, be reserved for the
future action of Congress. The quantity within these limits is about 7,700 acres, as estimated by the clerk of the surveys.

Within this tract is also situated the Jefferson Barracks, in Missouri.

By making this reserve, Congress can grant the 6,600 arpen's, which is all the inhabitants claimed, which is $5{,}104\frac{20}{100}$ acres, excluding all private claims, to the village of Carondelet for a common, or in such manner as may be deemed proper, and can retain of the public land 1,702 acres as a site for Jefferson Barracks, or for any disposition that may be judged expedient.

I further advise that the balance of the unappropriated land without the limits, and included in Rector's and Brown's surveys, and which amounts to several thousand acres, be surveyed and sold as public land.

I am, very respectfully, your obed't serv't,

SAM'L McROBERTS, *Solicitor.*

NOTE.—The papers are all returned. Plat X, which is especially referred to, is made part of this report.

9. Letter of Commissioner of General Land Office to Surveyor General Milburn, dated the 20 January, 1841, as follows:

GENERAL LAND OFFICE,
Jan. 20th, 1841.

SIR: In relation to the claims of the village of Carondelet, in Missouri, to a tract of land called the commons of that village, within which the military post of Jefferson Barracks is situated, I herewith enclose for your information a copy of report, No. 300, of Solicitor McRoberts,
and a copy of a communication of 18th November last, from the
44 Secretary of War, with a copy of his letter of the 16th of the
same month, to Brigadier General Atkinson, of Jefferson Barracks.

You will perceive that the Solicitor advises "that the tract of land beginning on the Mississippi River, at the figure laid down upon plat X, (which plat accompanied your report of the 15th April last,) and near the northeast corner of Martigny's survey, thence with the black dotted line to d, thence with the said line to the river Des Peres, and up the river to the line of Alvarez's survey, and across the river to letter e, and from said letter e to c, and on to the river with the present survey, be reserved for the further action of Congress," and remarks that by making this reserve Congress can grant the 6,000 arpen's ("all
inhabitants claimed, which $5{,}104\frac{20}{100}$ acres, excluding all private claims") to the village of Carondelet for commons, or in such manner as may be deemed proper, and can retain of the public land 1,702 acres as a site for Jefferson Barracks, or for any disposition that may be judged expedient.

He further advises "that the balance of the unappropriated land without those limits, and included in Rector and Brown's survey, an which amounts to several thousand acres, be reserved and sold as public land."

Concurring in this report, I have addressed a communication to the Hon. Secretary of the Treasury, with a view of having the matter brought to the attention of Congress for such action as may be deemed proper in the way of making a grant to the village of Carondelet, &c. In the meantime you are requested to represent on your records the tract within the limits suggested by the Solicitor, and referred to
45 in the foregoing as lands reserved for the purpose alluded to, and "the balance of the unappropriated land within those limits and included in Rector's and Brown's surveys," you are instructed to have surveyed as public land, to the end that the same may be duly brought into market as such.

Very respectfully, your obe't servant,

JA'S WHITCOMB, *Commissioner.*

W'M MILBURN, Esq.,
Sur. Gen'l, St. Louis, Mo.

10. Letter of Commissioner of Land Office Shields to Surveyor General Milburn, dated Sept. 1st, 1845, as follows:

(Copy.)

GENERAL LAND OFFICE,
Sept. 1st, 1845.

SIR: In reference to your communication of the 11th July, requesting that the surveyor general at St. Louis may be directed to carry out the instructions of 1841, relative to the survey into sections of part of the land claimed by the village of Carondelet as "the common," I have carefully examined that claim, and have came to the conclusion that it would be inexpedient at present to direct the survey of those lands, nor until the further action by Congress on the subject.

Very respectfully, your obed't servant,

JAMES SHIELDS,
Commissioner.

ALEXANDER KAYSER, Esq.,
St. Louis, Mo.

11. Decision of A. H. H. Stuart, Secretary of the Interior, dated January 25, 1853, as follows:

(Copy.)

The Carondelet Common Case.

After a careful consideration of this case, I am led to concur in the opinion expressed and judgment pronounced by the supreme court of the State of Missouri, at the July term, 1844, in the case of Dent
46 vs. Bingham, which involved the same principles which are in issue in this case. I am of opinion that the refusal of the Lieut. Gov. Trudeau, on the 7th Dec., 1796, to make the grant asked for in the petition of Gamache, is not evidence of title. The answer of Lieut. Gov. Trudeau is, at the most, merely evidence of an intention or purpose to make a grant, but certainly does not of itself con-

stitute a grant. A proprietor may very properly assign as a reason for not making a particular concession, his purpose to dispose of the property in another way; but the expression of such a purpose vests no right or title, legal or equitable, in the party in whose favor this intention has been expressed; the only source from which the village of Carondelet can derive a title in this case, is the confirmatory action of Congress. That action was founded on, and limited by, the claim then set up by Carondelet.

The confirmation was not intended to extend, and did not extend, beyond the claim asserted; and that claim was for 6,000 arpen's, extending in a direction described in the claim as filed.

It was not a claim by metes and bounds, for an estimated quantity of land, for if it had been, then the boundaries and not the quantity, would have governed; but it was a claim for a specified quantity of 6,000 arpen's, without regard to the boundaries, except on the side next the village, and extending from the boundary of the village as far as might be necessary to embrace the quantity of 6,000 arpen's claimed.

This was the claim which was confirmed, and in my judgment the village can claim no more. If, therefore, that quantity can be had without interfering with the rights of others, which had vested prior to the act of confirmation, the village of Carondelet is entitled to have it laid off. The Land Office will cause the necessary orders to be made to give effect to this decision.

A. H. H. STUART,
Secretary.

47 12. Letter of Commissioner of Land Office Wilson to surveyor general at St. Louis, February 5, 1853, as follows:

GENERAL LAND OFFICE,
February 5th, 1853.

SIR: With a letter of the 26th ult., I received the decision of the Secretary of the Interior in regard to the "Carondelet Common Case," and request that you will make known the purport of same to all parties interested, and cause a survey of that claim to be executed in accordance with said decision.

On the 28th ultimo, I addressed a letter to the Honorable Secretary of the Interior, stating that as a survey in accordance with this decision will detach a considerable body of land from the survey of Carondelet, as retraced by Brown in 1834, I requested that he would advise me whether, in ordering a survey in accordance with his decision, the lands which may be detached by the new survey, from Brown's survey, and not included in my other claim, shall be laid open to sale, or whether the same shall be held in reservation, subject to the further action of Congress in regard to them.

When an answer shall have been received, you will be duly advised of the same, so that your action may be in accordance therewith, and that you may advise the land offices of the proper district accordingly.

Very respectfully, your obed't servant,

JOHN WILSON,
Commissioner.

SUR. GEN'L,
St. Louis, Mo.

48 13. Survey of the alleged commons of Carondelet as made in , 1855, with accompanying certificate as follows:

(Here follows map, marked page 48.)

49 To the introduction of which in evidence defendants objected & the court excluded the evidence, to which exclusion plaintiff at the time excepted, and presents this bill of exceptions and ask that the same be allowed, which is accordingly done.

It was proved that the value of the premises in dispute was more than two thousand dollars.

SAMUEL TREAT, *Judge.* [SEAL.]

All these papers that are printed in the case of the City of Carondelet vs. The City of St. Louis may be copied from printed records.

WHITTELSEY, *Att'y P. D. with L. T. Gantt.*
B. A. HILL.
GLOVER & SHEPLEY, *for Pl'ffs.*

And afterwards, to wit, on the twenty-eighth day of November, A. D. 1870, said plaintiff, having been allowed a writ of error in this case to the Supreme Court of the United States, filed in the office of the clerk of said circuit court, the bond required by law on the suing out of such writ of error, which bond is in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, Charles W. Ford, of the City of St. Louis, State of Missouri, as principal, and John R. Shepley, of the same place as surety, are held and firmly bound unto Franz Emmeger and Catherine Graham, in the full and just sum of one thousand dollars to be paid to the said Franz Emmeger and Catherine Graham, their heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents, sealed with
50 our seals, and dated this twenty-eighth day of November, in the year of our Lord one thousand eight hundred and seventy.

Whereas, lately at the October term 1870 of the circuit court of the United States for the districts of Missouri, in a suit depending in said court between George W. Dent, plaintiff, and Franz Emmeger and Catherine Graham, defendants, judgment was rendered against the said plaintiff George W. Dent, and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Franz Emmeger and Catherine Graham, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next.

Now the condition of the above obligation is such, that if the said George W. Dent, plaintiff aforesaid, shall prosecute said writ to e[illegible] and answer all damages and costs if he fail to make good his plea, the above obligation to be void, else to remain in full force and vi[illegible].

CHARLES W. FORD. [SEAL.]
JOHN R. SHEPLEY. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

51 UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Benjamin F. Hickman, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of George W. Dent, plaintiff, against Franz Emmeger and Catherine Graham, defendants, ejectment, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name, and affix the seal of said court, at office, in the city of St. Louis, in said districts, this twenty-eighth day of November, in the year of our Lord eighteen hundred and seventy.

[SEAL.]

BEN. F. HICKMAN,
Clerk of said Court.

(Indorsed:) United States circuit court, districts of Missouri. George W. Dent, pl'ff, against Franz Emmeger & Catherine Graham, def'ts. Duly certified transcript of the record and proceedings in the above-entitled cause.

52 The United States of America to Franz Emmeger and Catherine Graham, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the districts of Missouri, wherein George W. Dent is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, one of the judges of the circuit court of the United States for the districts of Missouri, this twenty-eighth day of November, in the year of our Lord one thousand eight hundred and seventy.

SAMUEL TREAT.

53 Service of this citation acknowledged this 28 Nov., 1870.

WHITTELSEY,
Att'y P. D. with whom are Gantt & B. A. Hill.

54 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the districts of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the October term 1870 thereof, between George W. Dent, plaintiff, and Franz Emmeger and Catherine Graham, defendants, a manifest error hath happened, to the great damage of the said plaintiff George W. Dent, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your

seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court this twenty-eighth of November, in the year of our Lord one thousand eight hundred and seventy.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the districts of Missouri, dated as aforesaid.

BEN. F. HICKMAN,
Clerk C. C. U. S. Missouri Districts.

Allowed by—

SAMUEL TREAT, *Judge.*

55 In obedience to the within writ of error, I herewith transmit to the Supreme Court of the United States a transcript of the record and proceedings in the within entitled cause.

Witness my hand at office in St. Louis, Missouri, this twenty-eighth day of November, A. D. 1870.

BEN. F. HICKMAN,
Clerk of the Circuit Court of the United States,
for the Districts of Missouri.

(Indorsement on cover:) No. 324. George W. Dent, plaintiff in error, vs. Franz Emmeger & Catherine Graham. Missouri C. C. U. S. Filed 5th, December, 1870.

Supreme Court of the United States.

DECEMBER TERM, 1871.

GEORGE W. DENT, Plaintiff,

vs.

FRANZ EMMEGER AND CATHERINE GRAHAM,
Defendants.

STATEMENT OF THE CASE BY GLOVER AND SHEPLEY, FOR PLAINTIFF IN ERROR.

December 27, 1869, George W. Dent commenced an action of ejectment in the United States circuit court for the districts of Missouri to recover 30 acres of land lying within the lines of a confirmation of a Spanish concession to Gabriel Cerre, dated March 15, 1789, claimed for confirmation under the acts of Congress, March 2, 1805, and March 3, 1807; laid before the board for confirmation October 18, 1811, when it was rejected; afterwards confirmed by act of Congress July 4, 1836; surveyed February 6, 1838; again confirmed by act of Congress March 3, 1869, and patented to Gabriel Cerre's legal representatives May 3, 1869. The plaintiff owned Cerre's title.

The defendants claimed under a confirmation by act of June 13, 1812, to the village of Carondelet of a tract for common.

The claim to commons was surveyed by Elias Rector, United States deputy surveyor, under instructions from the office of the surveyor general, and said survey and field-notes were filed in said office and there recorded in 1817.

February 10, 1834, the survey of the common tract was retraced by J. C. Brown, U. S. deputy surveyor, and his survey

approved by surveyor general July 29, 1834. Many private claims were included in this survey. (Record, p. 9.)

There is nothing in the record to show the extent of boundary of the common or the existence of a claim to common prior to December 6, 1796. On that day a Mr. Gamache presented a petition to Governor Trudeau to enlarge the limits of the claim to common, which he refused to do on the next day.

December 25, 1797, Soulard, the surveyor general of the province, was requested to survey the claim to common, and was prevented from doing so.

The above was all the evidence in the cause, and the court held "that the plaintiff is not entitled to recover; because the title to the lands in question is in the defendants, who hold the Carondelet title." (Record, p. 10.)

The plaintiff offered to show that the approval by the office in St. Louis of Brown's survey, in 1834, of the common was not final; but was unsatisfactory to the Land Department, and was held under consideration of the authorities in Washington till October 8, 1855, when it was finally approved in these words:

"The said survey, as retraced by said Brown, was sanctioned by the decision of the Hon. R. McClelland, Secretary of the Interior, dated February 23, 1855, which decision was transmitted to this office for its information and government, and pursuant to said decision there is hereby made an unqualified exclusion from said survey 3,102 of survey 3,344, executed to the amount of 1,702.04 acres, (as shown by the field notes, furnished this office on the 28th March, 1855, by Commissioner of General Land Office,) on the 3d December, 1840, by George W. Waters, under direction from the War Department, of the military reserve at Jefferson barracks, as the absolute property of the United States, set apart for their own special use, and in exclusion from any laws for the disposal of the public domain, and in furtherance of said decision it is hereby declared *that, as regards the rights of all other claimants within the limits* of said

survey No. 3,102, who hold adversely to Carondelet, this approved plat *is in no manner intended, nor shall it be construed,* to interfere with the rights of such adverse claimants to *seek a judicial settlement of their several interests.*"

See record, from p. 10 to p. 26, inclusive, where the correspondence on the subject and the action of the Department is set forth; see, also, approved plat of survey, on file—containing the above qualified order of approval.

The court excluded this testimony, and plaintiff excepted. (Record, p. 26.)

The reason given by the court, as stated, (Record, p. 9,) is that it did not effect the outboundary line "as bearing on this suit."

Points and authorities by Glover & Shepley, Attorneys for plaintiff in error.

(1.) The concession to Cerre, of March 15, 1789, confirmed July 4, 1836, surveyed February 6, 1838, again confirmed by act of Congress, March 3, 1869, and patented May 3, 1869, is a valid title in itself, and the plaintiff was entitled to recover, unless the record shows an older and better title outstanding.

(2.) The title under the village of Carondelet is inferior to the plaintiff's title, because the act of June 13, 1812, under which Carondelet is supposed to have derived title, was a vague, indefinite grant. There had been no location of the claim to common, no survey, and no metes, or bounds. And this was its condition till October 8, 1855.

The grant in the act of June 13, 1812, was not attached to its land till Oct. 8, 1855. The decision of the circuit court, that the approval of Brown's survey in 1834 was final and conclusive, and the refusal of that court to hear any evidence touching the action of the land department in respect to said survey after 1834, cannot be sustained. The land department certainly had power to revise the act of the surveyor general

at St. Louis in approving Brown's survey of the common tract, and to annul or modify it as might seem proper. This has been the settled doctrine of this court.

17 How., 403, *West* v. *Cochran;* 1 Black, 195, *Magwire* vs. *Tyler;* Same Case, 8 Wallace.

We admit, a survey in such a case is an appropriative act. That in the case of an indefinite grant, like that for the common of Carondelet by the act of 1812, the approval of the survey is the first act which passes the title to the land. That until the survey takes effect, the grant attaches to no land.

If we concede then that the approval of Brown's survey in 1834 vested a title to the land in Carondelet, we insist nevertheless that the land department was competent to set aside the approval in whole or part, and this would divest the title to the same extent. Such was the decision of this court in respect to the survey of 1817 for Brazeau's representatives in *West* v. *Cochran*, 17 How., 403; and the ruling has been repeated in 8 Wallace, *Magwire* v. *Tyler*.

By the final approval of the survey for Carondelet it was so modified as to prevent its appropriating any land in Cerre's claim. All adverse claims were excluded. All adverse claims remained unaffected by anything in the survey. The effect of the survey for common was this, to designate for Carondolet all the lands inside of it, not covered by private adverse claims on Oct. 8, 1855.

The act of 1812, and the survey of the common as approved Oct. 8, 1855, had no effect to designate for Carondelet any land in Cerre's claim.

(3.) But we shall assume a bolder position, and claim that the act of Congress of June 13, 1812, was not operative to convey the land in Cerre's concession, even if it had been surveyed for Carondelet. The claim of Cerre was regularly made under the acts of Congress, March 2, 1805, and March 3, 1807, and was

rightfully claimed by Cerre until it was confirmed to him July 4, 1836, and surveyed Feb. 6, 1838.

The act of Congress, June 13, 1812, granted to Carondelet no land which was rightfully owned, or "*claimed by any private individual.*" (See section 2.)

Cerre was prosecuting his claim to this tract as his private property, when the act of Congress, 1812, was passed, and the subsequent confirmation is conclusive proof that this claim was rightful. 9 Wallace, 282, Public Schools *vs.* Walker.

For these two reasons, therefore, the judgment must be reversed:

(1.) Cerre's land was excluded expressly from the terms of the grant by the act of June 13, 1812, to Carondelet.

(2.) If the grant to Carondelet had embraced the land of Cerre, it has been excluded from the survey.

Glover & Shepley
for plff in
error

SUPREME COURT OF THE UNITED STATES.

No. 125. DECEMBER TERM, 1871.

GEORGE W. DENT, *Plaintiff in Error*,

vs.

FRANZ EMMEGER AND CATHARINE GRAHAM, *Defendants in Error*.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

POINTS AND BRIEF BY BRITTON A. HILL, OF COUNSEL FOR DEFENDANTS IN ERROR.

On the 29th of December, 1869, plaintiff in error sued defendants in the Circuit Court of the United States for the Districts of Missouri, in ejectment for 30 acres of land lying within the Commons of Carondelet. Defendants plead the general issue. Trial was had before the court, a jury being waived by consent of parties, and the finding was for the defendants. Final judgment was entered on this finding for defendants, and plaintiff sued out his writ of error.

The plaintiff claimed title, under a confirmation to Gabriel Cerre, for 400 arpens of land, by act of Congress of 4th of July, 1836; a survey of February, 1838; another act of Congress of March 3d, 1869; and a patent to the legal representatives of Gabriel Cerre, of May 3d, 1869. (See Record, p. 4.)

The inchoate grant to Cerre was made in 1789. He presented it for confirmation on the 18th of October, 1811, to the

first Board of Commissioners of Missouri, who rejected it. (Record, p. 4.)

Said inchoate grant was presented to another Board of Commissioners appointed under the act of 9th of July, 1832, which board reported in favor of the confirmation of this claim; and on the 4th of July, 1836, said claim was confirmed by act of Congress, on condition that it should not conflict with any *previous confirmation* or *location* under and by virtue of any act of Congress. U. S. Statutes at Large, vol. 5, sec. 2, p. 127, which declares "That if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof, had been previously located by any other person or persons under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title to such lands in opposition to the rights acquired by such location or purchase." * * * The balance of the section provides for the re-location of any of the said confirmations covering lands that had been previously located, surveyed or sold under any law of the United States.

Whatever claim passed to Cerre was vested under the act of 4th of July, 1836. That claim was merely one for re-location upon public lands of the United States that were subject to entry and sale, and was by said act expressly prohibited from taking effect upon any lands within the Commons of Carondelet that had been previously located under and by virtue of any prior act of Congress.

The act of March 3d, 1869, and the patent of May 3d, 1869, have no effect on the title. The derivative title of plaintiff is not in issue in this case. The question is between the two titles—of Cerre under the act of 1836, and of the defendants under the act of 1812.

The defendants claimed title under a confirmation by the first section of an act of Congress, of the 13th of June, 1812, which vested the title of the United States in the inhabitants of Carondelet for all the lands lying within the out-boundary line of the said commons, not previously granted or confirmed by any other act of Congress. (U. S. Stat. at Large, vol. 2, p. 748, §§ 1 and 2; *Les Bois v. Bramell*, 4 How. 449; *Mackey v. Dillon*, *id.* 430; *Chouteau v. Eckart*, 2 How.)

The commons of Carondelet, St. Louis, St. Charles, and other Spanish towns in the Territory of Upper Louisiana have always been held, by this court and by the Supreme Court of Missouri, to have been confirmed and granted *in presenti, proprio vigore*, on the 13th of June, 1812, to the said inhabitants in common, and to pass the title on that day from the United States to said inhabitants.

The inhabitants of Carondelet presented their claim for commons in 1806 before the old Board of Commissioners; Gabriel Cerre presented his claim in 1811, also — and they were both rejected. The confirmation to Carondelet by the act of the 13th of June, 1812, was an independent act of confirmation, and the claim of Cerre within the out-boundary line of the commons was excluded by force of said confirmation to Carondelet, which has been surveyed in 1817 by the United States as commons. (Rec. p. 7; ***Carondelet v. St. Louis***, on commons claim, 1 Black.)

All the questions arising in this case have been passed upon by this court in the cases of ***Chouteau v. Eckhart***, 2 How. 344, and ***Le Bois v. Bramell***, and ***Mackey v. Dillon***, 4 How. pp. 421–449. All these cases are directly in point upon the same questions, and they hold that a confirmation by said act of 1812 vests the legal title, without any patent, exclusively in the inhabitants of Carondelet, St. Louis and St. Charles, on the 13th of June, 1812, and is a better title than a confirmation like the one to Gabriel Cerre, by the act of Congress of July 4th, 1836.

The survey by the United States for the Commons of Carondelet, retracing the original survey of 1817, was approved in 1834. (Rec. pp. 6, 7.) The United States survey of Brown, of 1834, was a retracing of the lines of said old survey of the Carondelet Commons, and was approved and recorded as such in the Surveyor-General's office at St. Louis, on the 29th of July, 1834. (Rec. p. 7.) The inhabitants of Carondelet were declared to be a village, with certain boundaries, by the said act of Congress of the 13th of June, 1812, and they were formally incorporated on the 20th of August, 1832, under State laws. The said United States survey was accepted by the

inhabitants of Carondelet in 1834. This court held in the case of *Carondelet v St. Louis*, 1 Black, 179, that they had so accepted it, and were bound by the survey as it stood in 1834; that it was valid, and estopped them from claiming any land outside of the out-boundary lines of said survey. The record of *Carondelet v. St. Louis* contains all the facts. (1 Black.)

The only new feature presented in this case to distinguish it from the cases in the 2d and 4th How. arises under the act of Congress and patent of 1869. (Rec. pp. 4, 5.) The said act of Congress and patent of 1869 both leave the claim of Gabriel Cerre "*subject to any valid adverse rights*" and as this court has held, in said cases in 2d and 4th How., that the commons title of St. Louis and St. Charles under the said act of Congress of 1812, and similar surveys appoved in the same manner, vested a perfect title in said inhabitants on the 13th day of June, 1812, it must necessarily be "*a valid adverse right*," and no title can vest in Gabriel Cerre and his legal representatives by force either of the act of 1836 or the act of 1869. The defendants having a perfect legal title vested previous to the act of 1836 and 1869, the plaintiff can have no title to the same land. Congress has not the power to grant the same land that had already been granted to Carondelet, to any other claimant.

The act of confirmation to Carondelet on the 13th of June, 1812, has been held by this court to exclude such a claim as Gabriel Cerre's from all title or right under the acts of 1836 or 1869, or any other act subsequent in date to the 13th of June, 1812. (*Les Bois v. Bramell*, 4 How. 457–470.)

Several thousand persons in St. Louis, St. Charles and Carondelet hold title under the authority of the cases cited in 2d and 4th How., and the claims under confirmations of 1836 have been regarded as settled in favor of the commons title since the case of *Les Bois v. Bramell*, and parties have acquired their titles upon the faith of said decisions, and have held them for more than a quarter of a century.

In all cases of imperfect grants like those to Cerre, Les Bois, Mackay [illegible] and for the commons of the several

Spanish towns and villages, the theory of the judicial decisions in this court and of the courts of Louisiana, Mississippi, Alabama and Florida, has been that the title can only be granted by the United States, and the confirmee having the elder legal title from the United States is the legal owner of the property. The priority of these inchoate titles signifies nothing. At law or in equity the elder legal title must prevail, unless there are equitable grounds of trust, mistake or fraud, etc., to divest the elder title. A political equity arising under the treaty of Paris of 1803, founded upon these imperfect or inchoate titles, cannot be enforced in any court of justice in the United States. (*West v. Cochran*, 17 How. 413, 417.) The inchoate or imperfect grants by commandants of Spanish posts, who were frequently called lieutenant-governors, were mere permits to inhabitants of the posts to settle upon certain lands solicited by them, and passed no title from the Spanish government. Claimants under such permits to settle were generally directed to fulfill the conditions of such inchoate grants, and to apply to the Intendant-General at New Orleans, after they had obtained a Spanish survey, so as to procure the perfect title from the Spanish Intendant-General. (See Menard's Heirs *v.* Massey, 8 How. 293, 306; Les Bois *v.* Bramell, 4 How. 449.)

All such inchoate grants as Gabriel Cerre's, under which plaintiff claims, and others of a like character, never having been perfected into complete Spanish grants prior to the cession of Orleans and Louisiana to the United States, remained a part of the public domain; and the new sovereign, the United States, acquired the title to such lands by force of the treaty of Paris of 1803.

No title to any such lands included within any such inchoate claims or grants, could pass under the laws of the United States, unless Congress authorized it. Congress alone has power to grant the public lands or any such inchoate grants or claims. Whoever obtained, under any act of Congress, the oldest confirmation, held it by title paramount, as against all other persons or corporations having junior confirmations. So this court has held that the first Congressional grant passed the title, to the exclusion of all subsequent grants by Congress for the same

lands. (*Strother v. Lucas*, 12 Peters, 412; *Menards v. Massey*, 8 How. 293–306; *Gamache v. Piquenot*, 16 How. 401; *Guitard v. Stoddard*, 16 How. 494; *Savignac v. Garrison*, 16 How. 136; *West v. Cochran*, 17 How. 403–417; *Grignon v Astor*, 2 How. 419; *Bissell v. Penrose*, 8 How. 317; *Glasgow v. Hortiz*, 1 Black, 59; *Bryan v. Forsythe*, 19 How. 434.)

The plaintiff in the court below seemed to rely on the case of *Magwire v. Tyler*, 8 Wall. 671–2, to prevent the running of the statute of limitations; and on the case of the *Public Schools v. Walker*, 9 Wall. 286, to show that the claim of Gabriel Cerre continued as a rightful claim notwithstanding the grant to Carondelet for commons by the act of 13th of June, 1812. Plaintiff misapprehends or misapplies the principles involved and decided in the said cases. *Magwire v. Tyler* can have no application to this case, for as yet there is no question raised here upon the statute of limitations. The legal title is raised in this ejectment suit as between the two confirmations of 1812 and 1836. *Magwire v. Tyler* was a suit in equity, and no question of legal title was raised under the pleadings that could affect the main questions in equity on which that suit was based.

The case of the *Public Schools v. Walker* was an action of ejectment, the Schools claiming under the second section of the act of 1812, which reserved all vacant lots not rightfully owned or claimed by any private individuals, or held as commons belonging to the towns and villages, etc., as property reserved for the support of schools in said towns or villages; *provided* the quantity so reserved for schools should not exceed *one-twentieth part* of the whole lands in the survey for the said towns and villages. Defendant claimed a confirmation under the act of 4th of July, 1836, to Joseph Brazeau, as a better title than the school reservation, and insisted that the confirmation to Brazeau was conclusive evidence that his lot was rightfully owned or claimed by him, when the reservation for the schools was created in 1812. This court held the Brazeau confirmation of 1836 to be the better title at law, which is a proper construction of the acts of Congress involved in the decision of that case.

Such a reservation for the schools as the one contained in the second section of the act of 1812 was necessarily vague and undefined until its boundaries were ascertained and fixed by the government making the reservation. The school reservation did not operate as a grant *in presenti*, and should not be held to affect the validity of a confirmation like that to Joseph Brazeau.

The grant, by the first section of the act of 13th of June, 1812, for commons of the village of Carondelet, was an absolute grant, as held in *Les Bois v. Bramell*, 4 How. 449, and took effect on that day, to the exclusion of the Cerre grant, which is not protected by any exceptions in said act, or in the act confirming Cerre in 1836 or 1869.

The obvious distinction between the two great cases of *Les Bois v. Bramell* and the *Public Schools v. Walker* consists in the learned and masterly construction and interpretation, in each case, of the respective sections of the said act of 1812.

In the first case the grant, by the first section of the act, for commons, was held to be absolute, to pass the title in 1812 to the inhabitants of the villages, and that a confirmation of a lot to an individual in 1836 could not prevail against the elder legal title.

In the second case, the unsurveyed, vague reservation for schools, of all lots not rightfully owned or claimed *by individuals or as commons*, or as military reservations, is held not to be a grant of the lots rightfully owned or claimed by individuals, because they are expressly excepted from the reservation; and the confirmation of 1836 is proof of the validity of the claim, and is a better and older legal title than the reservation.

There is no conflict between these two cases. They stand together and support each other. As Brazeau's legal title was older and better than the reservation, excepting his claim from the operation of the second section of the act, so the Commons title is the elder and better title in this case, and for the same reasons. It is the priority of the legal title that gives the right to recover in ejectment.

For this reason, the new act of Congress of 1869, and the patent issued thereunder, do not give the plaintiff a title as old as the one already existing, of 1836, which is invalid because the defendants have an elder title of 1812.

The judgment of the court below should be affirmed.

BRITTON A. HILL,
Of counsel for Defendants in Error.

ST. LOUIS, *February* 20, 1872.

1 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States for the fourth circuit in and for the Maryland district, begun and held at the city of Baltimore, on the first Monday in November, (being the 1st day of the same month,) in the year of our Lord one thousand eight hundred and sixty-nine—

Present, the Honorable William F. Giles, judge Maryland district; Archibald Sterling, esquire, attorney; Edward Y. Goldsborough, esquire, marshal; James W. Chew, clerk—

Among other, were the following proceedings, to wit:

GEORGE P. STEINBACH
vs.
THE RELIEF FIRE INSURANCE COMPANY OF New York.

Be it remembered that, heretofore, to wit, on the 26th day of February, in the year of our Lord one thousand eight hundred and sixty-nine, the following record from the superior court of Baltimore City was filed in the circuit court here, to wit:

STATE OF MARYLAND,
City of Baltimore, sct:

At a session of the superior court of Baltimore City, in the eighth judicial circuit of the State of Maryland, begun and held at the
2 court-house, in the city of Baltimore, in and for the city aforesaid, on the second Monday of January, (being the eleventh day of the same month,) in the year of our Lord one thousand eight hundred and sixty-nine—

Present, the Honorable George W. Dobbin, associate judge of the supreme bench of Baltimore City, assigned to and presiding in the superior court of Baltimore City; John W. Davis, esq., sheriff; George Robinson, clerk—

Among other, were the following proceedings, to wit:

GEORGE P. STEINBACH
vs.
THE RELIEF FIRE INSURANCE COMPANY OF New York.

Be it remembered that, on the sixth day of February, in the year of our Lord eighteen hundred and sixty-nine, the said George P. Steinbach, by Alexander Wolff, esquire, his attorney, prosecuted and sued forth out of the superior court of Baltimore City here, the writ of the State of Maryland of summons, in form following, to wit:

BALTIMORE CITY, *to wit:*

State of Maryland to the sheriff of Baltimore City, greeting:

You are hereby commanded to summon The Relief Fire Insurance Company of New York, to appear before the superior court of Baltimore City, to be held at the court-house, in the same city, on the second
3 Monday of February instant, to answer an action at the suit of George P. Steinbach, and have you then and there this writ.

Witness the Honorable T. Parkin Scott, chief judge of the supreme bench of Baltimore City, the 11th day of January, 1869.

Issued 6th day of February, 1869.

GEO. ROBINSON, *Clerk.*

At which said second Monday of February, in the year aforesaid, a rule day, and the day of the return of the aforegoing writ, come into court here the said George P. Steinbach, by his attorney aforesaid, and the sheriff of Baltimore City aforesaid, to whom the said writ was in form aforesaid directed, makes return thereof to the court here thus endorsed:

"Summoned by service on W. P. Webb, ag't.

"JOHN W. DAVIS, *Sheriff.*"

And The Relief Fire Insurance Company of New York being called, appears in court here by William Meade Addison, its attorney.

And thereupon The Relief Fire Insurance Company of New York aforesaid, by its said attorney, prays that the said George P. Steinbach declare against it in the action aforesaid; whereupon it is ruled by the court here that the said George P. Steinbach declare against the said Relief Fire Insurance Company of New York within the next ensuing fifteen days, or judgment will be rendered against him by default.

And thereupon The Relief Fire Insurance Company of New York, by its said attorney, files in court here the following petition, to wit:

4 In the superior court of Baltimore City.

GEORGE P. STEINBACH
vs.
THE RELIEF FIRE INSURANCE COMPANY OF New York.

To the Honorable George W. Dobbin, associate judge of the supreme bench of Baltimore City, assigned to and presiding in said superior court of Baltimore City:

The petition of the defendant in this cause respectfully shows that the above suit is instituted by a citizen of the State of Maryland against the defendant, an incorporated institution of the State of New York, whose president, directors, & stockholders are citizens of the State of New York, and that said suit is instituted for the recovery of a larger sum of money than five hundred dollars, to wit, the sum of five thousand dollars, inclusive of costs; that your petitioner is advised that it hath the right to have said suit removed into the next circuit court of the United States for the district of Maryland, which said court holds its next session or term on the first Monday of April:

Wherefore it prays that this honorable court may pass an order directing forthwith the removal of this cause into the said United States circuit court, and that this court do not further proceed in this cause.

WM MEADE ADDISON,
Attorney for Defendant.

5 And thereupon the said defendant, by its said attorney, filed in court here the following bond, to wit:

Know all men by these presents that The Relief Fire Insurance Company of New York, by its agent, William P. Webb, and William P. Webb

as surety, are held and firmly bound unto George P. Steinbach in the full and just sum of ten thousand dollars, current money, to be paid to the said George P. Steinbach, his executors, administrators, or assigns, to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 20th day of February, 1869.

Whereas The Relief Fire Insurance Company has filed a petition to the superior court of Baltimore City for the removal of a certain cause in said court now pending between the said George P. Steinbach as plaintiff, and The Relief Fire Insurance Company of New York, into the next circuit court of the United States for the fourth circuit, to be holden in the district for trial therein:

Now, the condition of this obligation is such, that if The Relief Fire Insurance Company of New York shall, on the first day of the session of the said circuit court, file therein copies of all process and proceedings in the aforesaid cause, and appear in the said circuit court to
6 the said suit, then this obligation to be void; else to remain in full force & virtue in law.

W. P. WEBB, [SEAL.]
Agent Relief Ins. Co., N. Y.
W. P. WEBB. [SEAL.]

Test: F. A. PREVOST.

Which bond is thus endorsed, to wit:

I believe the within bond sufficient.

GEO. ROBINSON, *Clk.*

Bond approved.

GEORGE W. DOBBIN.

Thereupon the court passed & filed in said cause the following order, to wit:

In the superior court of Baltimore City, January term, 1869.

On consideration of the aforegoing petition it is this 25th day of February, 1869, ordered that the said cause be removed for trial into the next circuit court of the United States, to be held for the fourth circuit & district of Maryland.

GEORGE W. DOBBIN.

Test: GEO. ROBINSON, *Clerk.*

In testimony that the foregoing is a full and true transcript taken from the record of proceedings of the superior court of Baltimore City in the therein-named cause, I hereto set my hand and affix the
7 seal of said court on this 25th day of February, 1869.

[SEAL.] GEORGE ROBINSON, *Clerk.*

[5-cents int. rev. stamp.]

Plaintiff's costs	$6 74
Defendant's "	8 45

And afterwards, to wit, on the 4th day of March, in the year of our

Lord eighteen hundred & sixty-nine, the said George P. Steinbach, by A. Sterling, jr., and Alexander Wolff, esquires, his attorneys, filed in the circuit court here the following declaration, to wit:

In the circuit court of the United States for the Maryland district.

The Relief Fire Insurance Company of New York, a body corporate under the laws of the State of New York, and transacting business in the State of Maryland, by William P. Webb, its agent, was summoned to answer unto George P. Steinbach, a citizen of the State of Maryland, in a plea of trespass on the case on promises.

And thereupon the said plaintiff, by A. Stirling, jr,, and Alexander Wolff, his attorneys, complains: for that the said defendant heretofore,
8 to wit, at the district aforesaid, caused to be made a certain policy of insurance against loss by fire, signed by the president of said company and attested by the secretary thereof, and countersigned by the said William P. Webb, the agent for the said defendant for the State of Maryland, and did then and there, in consideration of the premium and sum of twenty dollars paid by said plaintiff to said defendant, at the time of the making of said policy, to make good to the said plaintiff all such loss or damage, not exceeding in amount the sum of five thousand dollars, on the said plaintiff's stock of fancy goods, toys, and other articles in his line of business, contained in the three-story brick building situate on the southeast corner of Baltimore street and Tripolett's alley, in the city of Baltimore, and at the time of the making of said policy, in his occupancy as a German jobber and importer, as should happen to the property above specified during one year from the 7th day of October, 1864, at 12 o'clock, noon, until the 7th day of October, 1865, at 12 o'clock, noon; the said policy being countersigned by said William P. Webb, agent, on the said 7th day of October, 1864, as by reference to the said policy of insurance will more fully appear; and the said policy was afterwards renewed from said 7th of October, 1865, to the 7th of October, 1866, at 12 o'clock, noon.

And the said plaintiff further says that the said stock of goods so insured and in said policy specified, on or about the 23d day of June,
9 1866, were consumed and destroyed by fire, whereby the plaintiff sustained damage and loss to a large amount, to wit, the amount of five thousand dollars; and that the plaintiff did forthwith after said loss, give notice thereof to the defendant, and also as soon after as possible did deliver to defendant an account, stating the particulars of said loss on his oath, and was ready and willing and offered to prove the same by the production of his books and such other proof as the defendant might reasonably require.

Whereby, by reason of said premises, and according to the tenor of the promise and undertaking aforesaid of the defendant, the defendant then and there became liable and ought to have paid to the plaintiff the said sum of money so by the defendant assured to him.

But the plaintiff says that the defendant did utterly neglect and wholly refuse to make good to the plaintiff the said loss or any part thereof, though the time for the payment thereof by said policy had fully arrived and expired, and hath hitherto refused, and doth still refuse, to make good to the plaintiff the said loss, or any part thereof, or to pay the plaintiff the said sum of five thousand dollars or any part thereof.

2d count. And whereas the defendant heretofore, to wit, on the first day of January, 1868, was indebted to plaintiff in the sum of five

10 thousand dollars for so much money by the defendant before that time had and received to and for the use of the plaintiff, and being so indebted the defendant, in consideration thereof, afterwards, sct., on the day and year aforesaid undertook, and then and there faithfully promised the plaintiff to pay him the said sum of money in this count mentioned, whenever the defendant should be thereto requested. Nevertheless the defendant hath not yet paid the said sum of money, or any part thereof to the plaintiff, although so to do the defendant, on the day and year aforesaid, and afterwards, was requested by the plaintiff, but to pay the same the defendant hath hitherto refused, and doth still refuse, to the damage of the plaintiff in the sum of six thousand dollars, wherefore he brings suit.

A. STERLING, JR.,
ALEX. WOLFF,
Plaintiff's Att'ys.

Which said declaration was thus endorsed, to wit:
Service of copy admitted.

W. M. ADDISON,
Def't's Att'y.

2d MARCH, 1869.

And now, here at this day, to wit, the first Monday in April, in the year eighteen hundred and sixty-nine, came into the circuit court here the said George P. Steinbach, by Archibald Sterling and Alex-
11 ander Wolff, esquires, his attorneys, and the said Relief Fire Insurance Company of New York, by William M. Addison esquire, its attorney.

And thereupon the said plaintiff, by his attorneys, prays that the said defendant may answer to the declaration of him, the said plaintiff, in the plea aforesaid; whereupon it is ruled by the court here that the said Relief Fire Insurance Company of New York answer to the declaration of the said George P. Steinbach, in the plea aforesaid, or judgment will be rendered against him by default.

And the said Relief Fire Insurance Company, by its said attorney, defends the force and injury, when, &c., and prays leave of the court here to imparle until the first Monday in November next, and it has it. The same day is given to the said George P. Steinbach, then and there, &c.

And afterwards, to wit, on the 9th day of October, in the year of our Lord eighteen hundred and sixty-nine, the said Relief Fire Insurance Company, by its attorney aforesaid, filed in the circuit court here the following plea, to wit:

In the circuit court of the United States for the 4th circuit in and for the Maryland district.

THE RELIEF FIRE INSURANCE COMPANY OF New York
ats.
GEORGE P. STEINBACH.

And the said defendant, by W'm Meade Addison, its attorney,
12 comes and defends the wrong & injury, when, &c., and saith it did not undertake or promise in manner & form, as the said plaintiff

has above thereof complained against it; and of this it puts itself on the country.

W'M MEADE ADDISON,
Attorney for Defendant.

And the said George P. Steinbach doth the like.

At which said first Monday in November, to wit, in the year of our Lord one thousand eight hundred and sixty-nine, until which day the said Relief Fire Insurance Company had leave to imparle, and then to answer the declaration of the said George P. Steinbach in the plea aforesaid, comes again into the circuit court here the parties aforesaid, by their attornies aforesaid.

And afterwards, to wit, on the 5th day of November, in the year of our Lord one thousand eight hundred and sixty-nine, the following agreement was filed in court here, to wit:

U. S. c. c't.

STEINBACH
v.
THE RELIEF FIRE INS. CO.

It is agreed that all errors in pleadings are waived, and any evidence may be offered that might be offered in any state of the pleadings.

A. STERLING, JR.,
For Pl'ff.
W'M MEADE ADDISON,
Att'y for Def't.

13 Whereupon, for trying the issue aforesaid above joined, between the parties aforesaid, it is ordered by the court here, that twenty persons, from the pan'el of petit jurors returned to the court here, by the marshal of the Maryland district aforesaid, be drawn by ballot. And thereupon the twenty persons being so drawn by ballot, and written upon two lists, is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, thereupon the remaining twelve persons being called, come, that is to say:

John M. Oreme, David Arthur, David King, James A. Standiford, N. Frank Weller, Benedict Boone, Christopher M. Biggs, J. E. McComas, David H. Shriver, John H. Yingling, Charles F. Worthington, and W'm Lee Amos, who, being empannelled and sworn to say the truth in the premises, upon their oaths do say that the said Relief Fire Insurance Company did not undertake and promise, in manner and form, as the said plaintiff hath above complained against it.

Therefore it is considered by the court here that the said George P. Steinbach take nothing by his said writ, but that he be in mercy for his false complaint, and that the said Relief Fire Insurance Company go thereof without day, &c. It is also considered by the court here that the said Relief Fire Insurance Company do recover against the said George P. Steinbach the sum of for its costs and charges
14 by it about its defence in this behalf sustained, to the said Relief Fire Insurance Company by the court here now adjudged, according to the form of the statute in such case made and provided, and that the said Relief Fire Insurance Company have thereof its execution.

Memorandum.

Before the jurors aforesaid withdrew from the bar of the court here the said George P. Steinbach, by his attornies aforesaid, filed in the court here the following bill of exceptions, to wit:

In the circuit court of the United States for the fourth circuit in and for the Maryland district.

GEORGE P. STEINBACH
vs.
THE RELIEF FIRE ISSURANCE COMPANY OF New York.

The plaintiff to prove the issue on his part offered in evidence the policy of insurance referred to in his declaration, & proved the same; the said policy being as follows:

No. 624.] [$5,000

THE RELIEF FIRE INSURANCE COMPANY OF NEW YORK.
Stock company.—Cash capital $200,000.

By this policy of insurance The Relief Insurance Company, in consideration of twenty dollars to them paid by the insured hereinafter
15 named, the receipt whereof is hereby acknowledged, do insure George P. Steinbach against loss or damage by fire to the amount of five thousand dollars—

Being in writing. On his stock of fancy goods, toys, and other articles in his line of business, contained in the three-story brick building situated on the southeast corner of Baltimore street and Tripolett's alley, and now in his occupancy as a German jobber and importer. Privilege to keep fire-crackers on sale.

And the said company do hereby promise and agree to make good unto the said insured, his executors, administrators, and assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, during to wit, from the 7th day of October, one thousand eight hundred and sixty-four, (at twelve o'clock at noon,) until the 7th day of October, one thousand eight hundred and sixty-five, (at twelve o'clock at noon,) the said loss or damage to be estimated according to the actual cash value of said property at the time the same shall happen, and to be paid within sixty days after due notice and proof thereof made by the insured, in conformity to the conditions annexed to this policy, unless the property be replaced or the company have given notice of their intention to rebuild or repair the damaged premises. Provided always, and it is hereby declared,
16 that this corporation shall not be liable to make good any loss or damage by fire which may happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power. And provided further, that if any other insurance has been or shall hereafter be made upon said property, not consented to by this company in writing hereon; or if the said property shall be sold or conveyed, or if this policy shall be assigned without the consent of the company obtained in writing hereon; or if the assured shall make any attempt to defraud the company, then, and in every such case, this policy shall be null and void. In case of loss, the insured shall not recover on this policy any greater proportion of the loss or damage sustained to the

subject insured than the amount *than the amount* hereby insured shall bear to the whole amount insured on the said property. And if the above-mentioned George P. Steinbach, at any time during the period for which this policy would otherwise continue in force, shall be used for the purpose of carrying on therein any trade or occupation, or for storeing or keeping therein articles, goods, or merchandise, denominated hazardous, or extra hazardous, or specially hazardous, in the second of the classes of hazards annexed to the policy, except as herein specially provided for, or hereinafter agreed to by this corporation in writing upon this policy, from thenceforth, so long as the same shall so be used, this policy shall be of no effect. And it is moreover declared, that
17 this insurance not intended to apply to or cover any books of account, written securities, deeds, or other evidence of title to property, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and that casts, curiosities, engravings, jewelry, jewels, medals, models, musical and scientific instruments, (piano-forte in dwelling house excepted,) paintings, pattern-plate, precious stones, printed music, prints, sculpture, statuary, and watches, are not deemed to be included in any insurance unless particularly specified in writing in the policy.

☞Whenever gunpowder or any other article subject to legal restrictions shall be kept in said premises in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for herein, this policy shall be null and void.

☞If steam-power be used in or about said premises, and the boiler bursts, or if any property hereby insured be struck by lightning or damaged by explosion from any cause whatever, this company shall not be liable, unless fire ensues, and then for the loss by fire only.

☞This policy is made and accepted in reference to the terms and conditions herein contained and hereto annexed, which are hereby declared to be a part of this contract.

In witness whereof The Relief Fire Insurance Company have caused these presents to be signed by the president and attested by their secretary, in the city of New York. But this policy is void until
18 countersigned by the agent of this company at Baltimore, Md.

J. W. PINCKNEY,
President.

W. E. CRARY, *Secretary.*

Countersigned at Baltimore on the 6th day of October, 1864.

W'M P. WEBB, *Agent.*

CLASSES OF HAZARDS.

First class.

Not hazardous. Staple foreign goods in packages, and staple domestic dry-goods, and household furniture in dwelling-houses may be insured at 5 cents per $100, in addition to the rate of the building.

Hazardous No. 1. The foregoing articles of merchandise are charged 10 cents per $100 more than the building, but do not increase the rate of the building nor its other contents: Stocks of general dry-goods, including cotton batts and wadding, of embroideries and laces, of pins, of tailor's goods and of ready-made clothing; also of agricultural implements, boots and shoes, coffee, flour, furs and peltrie in packages, glass and window

plate, or looking-glasses in boxes, hardware and cutlery, hides and leather, hops in bale, indigo, iron ware, metals & in bars, rods, pigs, and sheals; paints, paper-hangings, paper in reams; pot, pearl, and soda ashes; rice, salt, spices, straw-braid and straw-hats, in packages as imported, teas, threshed grain, tin, copper, and sheet-iron ware, tobacco, snuff, whale-bone, wine in casks and in glass, in packages.

Extra hazardous No. 2. The following articles of merchandise are charged 20 cents per $100 more than the building, but do not
19 increase the rate of building nor its other contents: Artificial flowers and feathers, gas-fixtures, colorman's stock; china, glass, or earthen, or window or plate glass, or looking-glasses unpacked, fishing tackle, furs unpacked, liquors and wines in glass unpacked, musical instruments and printed music, percussion caps, pictures and prints, precious stones, silver plate and plated-ware, straw goods, India-rubber hard goods; also stocks of books; of cabinet ware, of confectionary, of deguerr'otype materials, of carriages, of feathers, of jewelry, of watches, of watchmakers' tools, of lamps, of brushes, of millinary, of military goods, of needles, of optical and mathematical instruments, of paper-boxes and band boxes, of perfumery, of pocketbooks, of segars in segar stores and manufactories, of stationary, of toys.

Second class.

Hazardous No. 2. The following trades, occupations, and merchandize add to the rate of the building and its contents 10 cents per $100: Belting and car springs of India-rubber or gutta-percha; card printing, china or earthen ware, or glass-ware in boxes, crates or casks, eating-houses, porter-houses, fire-crackers in packages, flax, hemp, manilla and sisal grass, and tow in bales, flacks, grocer stocks, gum shellack, gutta-percha and India-rubber unmanufactured; hat ironing, oil (fish and vegetable) provisions, sail making, spirituous liquors, sugars, sul-
20 phur, tallow, *tavers* wine dealers' stock, wool.

Extra Hazardous No. 2. The following articles of merchandize add to the rate of the buildings and its contents 20 cents per $100: Alcohol, apothecaries' stocks, (retail only,) basket-seller's stocks, china or earthern ware, or glass-ware, or looking-glasses, with privilege of packing or unpacking; cotton in bales, cotton broker's samples, drugs, (importers' stock of *im*flam'able acids or phosphorous,) essential oils, gum copal, India-rubber or gutta-percha goods, hay and straw pressed in bundles, lime, unslacked, in lime stores, manilla and sisal grass unpacked, matches, stock of on sale; oakum in bales, oiled clothing, printer's stock, pitch, rags in packages, rosin and rosin oil, ship chandlery, turpentine, tar, spirits of turpentine, varnish, wood and willow ware.

Extra Hazardous No. 3. The following trades and occupations add to the rate of the building and its contents 20 cents per $100: Baderies with ovens outside of the building and using coal; basket bleaching, basket making, blacksmiths' shops, block and pump making, bottling cellars, box-repairing workshops, brass-turning and working, carving, chocolate making, coopering, copper-plate printing, daguerreotyping, electroplating, fring' making by hand-power, gas fitting, gilding, gold pen making, gun repairing, hat bleaching, jewelry manufactur-
21 ing, lamp manufacturing, liquor-bottling establishments, lithographing, map mounting and varnishing, morocco manufacturing, plumbing and pewtering, printing of newspapers and engravings by hand-power only, provision warehouses with brick smoke-houses

attached; silversmithing, tin or sheet-iron worker, turning in wood, umbrella manufacturing, upholstering; also private stables.

Specially hazardous. The following trades, occupations, and merchandize add to the rate of the building and its contents 50 cents or more per $100, and to be covered must be specially written in the policy: Acids (nitric, sulphuric, muriatic and other acids, causing ignition,) bakeries, (burning wood,) brush and bellows making, burning fluid, camphine, cotton unpacked, cotton pressed, druggists' stock, (wholesale,) ether, fireworks, flax unpacked, gunpowder, hemp unpacked; houses being built, altered, or repaired, junk shops, livery stables, *minge*, omnibus stables, phosphrorus, provisions in smoke-houses, rag stores, saltpetre, shoddy, smoke-houses, spirit gas on sale, steam-engines in use, theatres and other places of exhibition, tow unpacked, woodwash, and all workshops, manufacturing establishments, trades, and mills not above enumerated as hazardous or extra hazardous.

☞ Camphene, spirit gas, or "burning fluid," or any similar *en*flam-
'able fluid, when used in stores, warehouses, shops, or manufactories as
a light, subjects the goods therein to an additional charge, and
22 such use is prohibited under this policy, unless permission there-
for shall be endorsed in writing hereon. All lights in show windows must be protected from articles coming in contact with the same, or no loss will be paid for any damage arising therefrom.

☞ Fences and other yard fixtures, also stove furniture and fixtures, and plated glass and windows, when the plates are three feet square or more in dimensions, must be seperately and specifically insured.

Conditions of insurance.

I. If any person effecting insurance in this company, shall make any misrepresentation or concealment touching the risk to be assumed, or if, during the existance of this policy or any renewal thereof, the risk shall be increased by any means within the control of the assured, or by the occupation of the premises for more hazardous purposes than are permitted by this policy; or, if the assured, at or before the taking of any renewal, shall fail to notify the company, in writing, of any increase of the hazard, whether within or without the premises, then this policy shall be void. Every renewal shall be deemed to be made upon the faith of the representation upon which the original policy was granted unless superseded by a new description of the risk.

II. The insurance may be terminated at the request of the assured, in which case the company may retain the usual short notes for the time
the policy has been in force. This insurance may also be at *a*
23 time terminated at the option of the company, on giving notice
to that effect, and refunding a rateable proportion of the premium if the same has been actually paid for the unexpired term of the policy.

III. If the property to be insured be held in trust or on commission, or be a leasehold, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing; otherwise, the insurance as to such property shall be void, and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss with the respective interests therein.

IV. Goods held on storeage must be seperately and specifically insured.

V. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium to the company or their agent.

VI. It is agreed that the person or persons, if any, other than the assured, who have procured the insurance to be taken by this company, shall be deemed to be the agent or agents of the assured, and not of this company, in any transaction relating to the insurance, unless he be the regularly appointed agent of this company.

VII. If, at the happening of any fire, the assured shall have insurance under a floating policy or policies, not specific, but covering goods generally, in various places not designated, and yet within the limits which include the premises or property herein insured, such policy as between the assured and this company shall be considered as covering
24 any excess of sound value of the subject insured beyond the amount covered by the specific insurance thereon, and to determine the amount for which this company is liable in case of loss, such floating policy shall be considered an insurance on the property to the extent of such excess.

VIII. In case of fire or exposure to loss or damage thereby, the assured shall use their best endeavors to save and protect the property; and the company shall not be liable for any loss sustained in neglect to do so; and all claims for goods or articles missed or stolen, resulting from the fire, must be particularly specified; and it is mutually understood that there can be no abandonment to the insurers of the subject insured.

IX. Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company, and within sixty days from the occurring of said fire, they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands, and they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also the ownership of the property insured; what other insurance, if any, existed on the same property, and giving a copy of the written portion of the policy of each company; what was the whole, sound, or cash value of the subject insured; in what manner the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss; who were the occupants of such
25 building; and when and how the fire originated, so far as they know or believe. They shall also produce a certificate under the hand and seal of a magistrate or notary public, most contiguous to the place of the fire, and not concerned in the loss, stating that he has examined the circumstances attending the fire, loss, or damage alleged; that he is acquainted with the character and circumstances of the claimant, and that he verily believes that such claimant has, by misfortune, and without fraud or evil practice, sustained loss and damage to the subject insured to the amount which such magistrate or notary shall certify.

When merchandize or other personal property is partially damaged, the assured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, seperating the damaged from the undamaged; and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity and cost of each, and the amount of sound or cash value. The damaged shall then be ascertained by the examination and appraisal of each article by disinterested appraisers, mutually agreed on.

Whenever required, in writing, the insured, or person claiming, shall exhibit his books of account and other vouchers to the insurers, or their agent, at the office of the company, and permit copies thereof to be

made, and shall also exhibit to any persons named by the com-
26 pany, and shall permit to be examined by them any property damaged on which loss is claimed, or any property saved, which was insured by this policy, and until such proofs, declarations, and certificates are produced and such appraisals and examinations of property and accounts permitted by the claimants, the loss shall not be payable.

In case of claim for loss or damage on a policy assigned, where there no actual sale or transfer of the property insured, proofs of loss shall be made by the assured in comformity with the conditions of this policy in like manner, *and* if no assignment has been made; otherwise, this policy shall be void.

The sound cash value of the property destroyed or damaged by fire shall be deemed to be such as it may cost at the time of the fire to replace the same.

X. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and quality, or to take the goods at their appraised value, or to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention to do so within thirty days after having received the preliminary proof of loss required by these conditions.

XI. In case differences shall arise concerning the amount of any loss or damage, the matter, at the written request of either party,
27 shall be submitted to the judgment of disinterested arbitrators, mutually chosen, whose award shall be binding on the parties as to such amount, but such award shall not decide the liability of this company under this policy: and any proposition to appraise or arbitrate does not waive any of the requirement' of these conditions.

XII. Any fraud or attempt at fraud, or any false swearing, shall cause a forfeiture of all claim on this company, under this policy.

(The part of this policy marked on this record as "written" is all the written part, except the names and dates.)

The plaintiff proved that the stock of goods in his store was insured in five other insurance companies, (in four of which there were the words, "fire-works permitted.")

He then proved by the plaintiff, who was examined as a witness, that, on the 26th June, 1866, a fire occurred that consumed & damaged his stock in store to the value of $22,512 97, and that said fire originated in the fire-works that he had in store for sale, and that the share of defendant's loss was $4,078 44.

The plaintiff then offered to prove by the same witness that fireworks constituted an article "in the line of business of a German jobber & im-
porter;" but the defendant objected to such proof, & his objec-
28 tion being sustained, and the plaintiff's offer of such proof being overruled, the plaintiff excepted thereto, & prayed the court to sign & seal this his bill of exceptions; which is accordingly done this fifth day of November, 1869.

WILLIAM F. GILES. [SEAL.]

And afterwards, to wit, on the nineteenth day of August, in the year of our Lord one thousand eight hundred and seventy, the said George P. Steinbach, by his attorneys aforesaid, sued out of the circuit court here the writ of the United States of America for the correcting of errors of and upon the premises, commanding that the judgment afore-

said, so as aforesaid rendered, with all things thereunto relating, be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the first Monday of December next; the tenor of which said writ is as follows, to wit:

29 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the judges of the circuit court of the United States for the fourth circuit in and for the Maryland district, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court, before you or some of you, between George P. Steinbach, plaintiff, and The Relief Fire Insurance Company of New York, defendant, a manifest error hath happened to the great damage of the said George P. Steinbach, as by this complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly & openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and
30 according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and sixty-nine.

Issued the 19th day of August, 1870.

JAMES W. CHEW,
Clerk Circuit Court.

31 The United States of America to The Relief Fire Insurance Company of New York, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fourth circuit in and for the Maryland district, wherein George P. Steinbach is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said George P. Steinbach should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness my hand and seal this twenty-seventh day of August, in the year of our Lord one thousand eight hundred and seventy.

WILLIAM F. GILES. [SEAL.]

Service acknowledged this tenth day of September, A. D. 1870.

W'M MEADE ADDISON,
Attorney for Defendant in Error.

32

33 *Appeal bond.*

Know all men by these presents that we, George P. Steinbach, Charles W. Spilker, and Charles Rogge, are held and firmly bound unto The Relief Fire Insurance Company of New York in the full and just sum of three hundred dollars, to be paid to the said The Relief Fire Insurance Company of New York, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals this eighteenth day of August, in the year of our Lord eighteen hundred and seventy.

Whereas lately, at a circuit court of the United States for the fourth circuit and district of Maryland, begun and held at the city of Baltimore, on the first Monday of November, in the year of our Lord eighteen hundred and sixty-nine, in a suit depending in said court between the said George P. Steinbach, plaintiff, and the said The Relief Fire Insurance Company of New York, defendant, judgment was rendered against the said George P. Steinbach, and the said George P. Steinbach having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid court, and a citation directed to the said The Relief Fire Insurance Company of New York, citing and admonishing them to be and appear at a Supreme Court to be holden at Washington on the first Monday of December next:

34 Now, the condition of the above obligation is such, that if the said George P. Steinbach shall prosecute his said writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

GEO. P. STEINBACH. [SEAL.]
CHA'S W. SPILKER. [SEAL.]
CH'R. ROGGE. [SEAL.]

Signed, sealed, and delivered in presence of—
Witness:
EDW. HENBACH.

(Endorsed:) Bond approved 19 August, 1870.
WILLIAM F. GILES.

In testimony that the aforegoing is a true copy, taken from the record and proceedings in the circuit court aforesaid, I hereunto subscribe my name and affix the seal of the said circuit court this twenty-eighth day of October, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] JAMES W. CHEW,
Clerk Circuit Court.

(Indorsement on cover:) No. 325. George P. Steinbach, plaintiff in error, vs. The Relief Fire Insurance Company of New York. Maryland C. C. U. S. Filed 5th December, 1870.

Supreme Court of the U. S.

GEORGE P. STEINBACH,
PLAINTIFF IN ERROR,

vs.

THE RELIEF FIRE INSURANCE COMPANY
OF NEW YORK.

Error to the Circuit Court of the United States for the District of Maryland.

BRIEF FOR PLAINTIFF IN ERROR.

A. STIRLING, JR.,
ALEX. WOLFF,
Counsel for Plaintiff in Error.

KELLY, PIET & CO., Printers and Stationers, Baltimore.

Supreme Court of the U. S.

GEORGE P. STEINBACH,

PLAINTIFF IN ERROR,

vs.

THE RELIEF FIRE INSURANCE COMPANY OF NEW YORK.

Error to the Circuit Court of the United States for the District of Maryland.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action brought by the Plaintiff in Error upon a Policy of Insurance, against loss by fire, made by the Defendant in Error, a corporation created by the laws of New York.

The suit was brought in the Superior Court of Baltimore City, Maryland, and process served on the Defendant's General Agent in Baltimore.

The Defendant appeared and removed the case, according to the Act of Congress, into the Circuit Court of the United States, for the Maryland District. (See pages 1, 2 and 3 of Record.)

Declaration and pleas were filed in said Circuit Court. (Pages 4, 5 and 6.)

The policy of insurance insured the Plaintiff to the amount of Five Thousand Dollars in these words, "on his stock of fancy goods, toys, and other articles in his line of business, contained in the three story brick building, situated on the South-east corner of Baltimore Street and Tripolett's Alley, and now in his occupancy as a German Jobber and Importer, privilege to keep fire-crackers on sale."

The above language in brackets is in writing, all the rest of the policy is printed.

In the printed part, the policy states "If the property shall be used for storing or keeping thereon articles, goods or merchandise, denominated hazardous, extra hazardous, or specially hazardous in the second of the classes of hazards annexed to the policy, except as herein specially provided, or hereinafter agreed to in writing upon this policy, thenceforth so long as so used the policy shall be of no effect." (Record, pages 7 and 8.)

Among the articles denominated as specially hazardous in said annexed classes are *Fireworks.* (See page 10.)

At the trial of the cause the Plaintiff proved loss by fire on the stock of goods on his said store, and that the proportion of loss falling on the Defendant was $4,078.44. It also came out in evidence that at the time of the fire the Plaintiff had fireworks in store for sale.

The Plaintiff then offered to prove that fireworks were an article in his line of business as a German Jobber and Importer, for the purpose of showing that they were covered by the written words of the policy. The Court refused to admit the evidence and exception was taken, (Record, page 12,) and the verdict being against him after the above ruling, took out his Writ of Error.

POINTS.

First. The written part of the policy controls the printed parts.

Angell on Insurance, sections 14 and 15.
1st Phillipps on Insurance, page 16.
Flanders on Fire Insurance—70—88.

Pindar vs. Kings Co. Ins. Co., 36 N. York, 648.
Hayward vs. North Western Ins. Co., 19 Abbot's R. Rep., 116, and cases cited below in brief.

Second. For the purpose of showing that the written part of the policy covered fireworks, it was proper to prove what "articles" were in the Plaintiff's "line of business as a German Jobber and Importer," and it was a question for the jury whether fireworks were part of the stock of fancy goods, toys and other articles in the Plaintiff's line of business.

Flanders on Fire Insurance, 73 and 76.
Franklin Fire Insurance Company vs. Updegraff and Wright 350, and authorities cited below.

Third. Although fireworks and other articles kept on hand by Plaintiff and by all persons in his line of business are enumerated in the printed part of the policy as "hazardous," "extra hazardous," or "specially hazardous" and are required in order to be insured to be specified in the policy in writing, yet if it can be proved that fireworks were kept on sale by the Plaintiff and constituted an "Article in his line of business, &c.," then fireworks are within the language of the written part, and are insured without reference to the printed part, and are in law "specified in the policy in writing."

The Insurer, instead of enumerating specially all the Plaintiff's stock of goods which he intended to cover by the policy, comprised them in a general description in writing, by specifying them as all articles in the Plaintiff's line of business as a German Jobber and Importer, and thereby insured all articles so kept by the insured, and necessary for the proper carrying on of his business.

Flander's on Fire Insurance, pages 70 to 82, inclusive.
Wall vs. Howard Ins. Co., 14 Barbour, 383.
Harper vs. The Albany Ins. Co., 17 New York, 194.
Bigler vs. New York Ins. Co., 20 Barbour, 635.
Benedict vs. The Ocean Co., 31 New York, 389.
Harper vs. New York City Ins. Co., 22 New York, 441.
Moadinger vs. Merchants' Fire Ins. Co., 2 Hall, N. Y. R., 490.
Delonguemare vs. Tradesmen's Ins. Co., 2 Hall, N. Y. R., 589.
Wall and others vs. Howard Fire Ins. Co., 14 Barbour, 383.
Girard Ins. Co. vs. Stephenson, 1 Wright, 198.
Citizens' Ins. Co. vs. McLaughlin, American Law Register, new series, vol. 6, page 374.
Archer vs. Merchants' Fire Ins. Co., 43 Missouri, 434.
Crosby vs. Franklin, 5 Gray, 804.
Phœnix Ins. Co. vs. Taylor, 5 Minnesota, 492.
Blake vs. Exchange Mutual Ins. Co., 12 Gray, 265.
Washington Mutual Ins. Co. vs. Merchants' and Manufacturers' Ins. Co., 5 Ohio, St. Rep., 450.
Collins vs. Charlestown Mutual Ins. Co., 10 Gray, 155.
Franklin Fire Ins. Co. vs. Updegraff, 7 Wright, 350.
Spring Garden Ins. Co. vs. Scott, Flanders on Fire Ins., folio 84.
Steinbach vs. Lafayette Fire Ins. Co., Circuit Court for Kings County of Brooklyn, opinion of Judge Gilbert, vide certified copy of Records.
Same vs. Same, Supreme Court of NewYork, see opinion of Barnard, Judge, certified copy.

A. STIRLING, JR.,
ALEX. WOLFF,
Counsel for Plaintiff in Error.

Supreme Court of the U. S.

GEORGE P. STEINBACH,

vs.

THE RELIEF FIRE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF UNITED STATES FOR MARYLAND.

Murray & Co. Printers, Booksellers and Stationers, 129 Baltimore street, Baltimore.

Supreme Court of the U. S.

GEORGE P. STEINBACH,

vs.

THE RELIEF FIRE INSURANCE COMPANY.

In Error to the Circuit Court of the United States for Maryland.

The suit was brought on a Policy of Insurance against fire.

The policy was proved. The plaintiff in error was insured from October 7th, 1864, to the same day, 1865.

The subject insured was described in writing as follows, in the body of the policy, (page 7:)

"On his stock of fancy goods, toys and other articles in his line of business, contained in the three-story brick building situated on the southeast corner of Baltimore street and Tripolett's alley, and now in his occupancy as a German jobber and importer. Privileged to keep fire-crackers on sale."

The amount insured was $5,000, and the premium paid was $20; that is, 40 cents on the $100.

It was provided in the policy (page 7) that if any other insurance had been or should be made on the property, without the consent of defendant in writing on the policy, then this policy should be null and void. And it was also provided, if the premises should be "used for the purpose of carrying on therein and trade or occupation, or for storing or keeping therein arti-

cles, goods or merchandize, denominated hazardous, or extra hazardous, or specially hazardous, in the second class of hazards annexed to the policy, except as herein specially provided for, or hereinafter agreed to by this corporation in writing upon this policy, from thenceforth, so long as the same shall so be used, this policy shall be of no effect." (Page. 8)

And it was declared that the policy was "made and accepted in reference to the terms and conditions herein contained and hereto annexed, which are hereby declared to be a part of this contract." (Page 8.)

Among the second class of hazards, classed as Hazardous, No. 2, we find enumerated "fire-crackers in packages," and it is stated that they add to the rate of premium 10 cents per $100. (Page 9.) And we find (page 10) classed as Specially Hazardous "*fireworks*," and it is stated that articles in this class add 50 cents or more to the rate, and to be covered must be specially written in the policy.

The plaintiff proved that the stock of goods in his store was insured in five other companies; in four of which there were the words, "fireworks permitted."

The plaintiff then in person testified that on the 26th of June, 1866, a fire occurred that consumed and damaged his stock to the value of $\$22{,}512\frac{97}{100}$, and that defendants share of loss was $\$4{,}078\frac{44}{100}$, and that said fire originated in the fireworks that he had in store for sale. The plaintiff then offered to prove by his own testimony "that fireworks constituted an article in the line of business of a German jobber and importer." Defendant objected, and the Court refused to admit the evidence. The plaintiff excepted and the admissibility of this evidence is the only question in the case.

POINTS.

First: The policy provides, in distinct terms, that it shall be made void by keeping certain prohibited articles on the premises, except as "herein specially provided for." And among

the prohibited articles classed as causing the greatest degree of hazard, we find "fireworks," and with reference to them, it is stated that they add 50 cents per $100 to the rate of insurance, and apparently, with great carefulness, it is repeated that, "to be covered, they must be specially written in the policy." (Page 10.)

This 50 cents, which would have been added to the rate, is 25 per cent. more than the total premium charged. With respect to an article involving a much lower degree of hazard, that is to say, "fire-crackers," (page 9,) special permission was sought and obtained to keep them. With respect to fireworks, no such permission was granted.

Second: The clear result of the terms of the policy, prohibits fireworks. This construction gives effect to every part, prevents any conflict between different clauses, and attributes to them all one common harmonious intent and purpose. It must, therefore, be adopted.

2 Parson's Maritime Law, pp. 49, 53.

Goicochea vs. Louisiana Ins. Co., 18 Martin Louisiana Rep., 51.

Hunter vs. General Mutual Ins. Co., 11 Louisiana Annual R., 139.

Merchants' Ins. Co. vs. Edmonds, *et al.*, 17 Grattan (Va.) R., 138.

Robertson vs. French, 4 East., 130.

Washburn vs. Gould, 3 Story R., 162.

Third: The policy having a definite meaning on its face, free from all ambiguity, it is improper to resort to parol evidence to vary or contradict it.

Fourth: The evidence proposed to be offered was of the most inconclusive character. It was not alleged that there was any general, well-known custom to keep fireworks on premises of the description occupied by the insured; nor that fireworks were necessary to enable him to carry on his business; nor that

in point of fact they were on the premises at the time the insurance was effected. But it was simply proposed to show that they "constituted an article in the line of business of a German jobber and importer." By what usage? When and where did the usage prevail? Did it relate to the city of Baltimore? Was it in existence at the time of the insurance? Was it general, notorious, well-established, certain and uniform? or was it known to the insurers? The evidence did not propose to embrace any of these points. But it was an attempt, simply and flatly, to contradict the written contract. This was clearly incompetent.

Insurance Co.'s vs. Wright, 1 Wallace's Rep., 470, 471.
Foley & Woodside vs. Mason, 6 Md. Rep., 49, 50.
McComber vs. Howard Fire Ins. Co., 7 Gray, (Mass.) 257.
Whitmarsh vs. Charter Oak Ins. Co., 2 Allen, (Mass.) 582.
Beacon Life Ins. Co. vs. Gibb, Law Reporter, vol. 7, N. S., p. 575, (London.)

Fourth: The stock of goods was insured from October 7th, 1864, to same day, 1865, and the fire occurred June 26th, 1866. There was no evidence of any renewal.

Fifth: The property had been insured in five other companies, contrary to the prohibitions of the policy. (Page 12.)

Sixth: The plaintiff proved these matters by his own oath, and thereby shewed that it was impossible to recover under any circumstances.

In this view of the case, it is immaterial to consider the question of the admissibility of the evidence.

WM. SHEPARD BRYAN,
for Defendant in Error.